95-425

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

PRO-ECO, INC.,

Petitioner,

v.

BOARD OF COMMISSIONERS
OF JAY COUNTY, INDIANA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal district court deny a petition for further relief based on a declaratory judgment, after refusing to hold the hearing which is contemplated by 28 U.S.C. § 2202, because the district court believes that the need to present additional evidence and arguments at the hearing indicates that the further relief sought will not be "based on" the declaratory judgment which it had previously entered?

2. May a property interest, the protection of which is sought under the Fifth and Fourteenth Amendments to the United States Constitution, be created by and arise from an option contract for the purchase of real property, or from the right to engage in a lawful business which is guaranteed by a state constitution and the law arising thereunder?

3. When an owner of an interest in real estate has, prior to the existence of any zoning ordinances within a county, invested capital and labor in excess of $ 220,000.00 to obtain an option for the purchase of real estate and to develop a sanitary landfill thereon, and the county legislative body, upon learning of the intended development, exceeds its statutory authority and enacts an illegal moratorium prohibiting the development of sanitary landfills within the county, are the owner's substantive due process rights violated, under the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES TO PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were the Petitioner, Pro-Eco, Inc., and the Respondent, the Board of Commissioners of Jay County, Indiana.

The Petitioner, Pro-Eco, Inc., is an Indiana corporation, having its principal office located in Evansville, Indiana, and has no parent or subsidiary corporations or organizations.

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BOARD OF COMMISSIONERS
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To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Pro-Eco, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on June 6, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, which was entered on June 6, 1995, is reported at

57 F.3d 505 (7th Cir. 1995), and is reprinted in the Appendix hereto at App. 1-25.

The memorandum decision of the United States District Court for the Southern District of Indiana (McKinney, J.), entered on October 5, 1993, has not been reported. It is reprinted in the Appendix at App. 26-30.

A prior opinion entered in the above-entitled proceeding by the Court of Appeals for the Seventh Circuit is reported at 956 F.2d 635 (7th Cir. 1992), and is reprinted in the Appendix at App. 34-43.

The original order and opinion of the District Court for the Southern District of Indiana, granting summary judgment and declaratory judgment in favor of the Petitioner, is reported at 776 F. Supp. 1368 (S.D. Ind. 1990), and is reprinted in the Appendix at App. 44-54.

JURISDICTION

The Petitioner originally filed this action in the Circuit Court for Jay County, Indiana, on May 16, 1989. After a change of venue to another state court, and, upon the Respondent's verified petition for removal, the action was removed, pursuant to 28 U.S.C. § 1441, to the United States District Court for the Southern District of Indiana, with the Southern District's jurisdiction over this cause being invoked under 28 U.S.C. § 1331. On September 20, 1990, the Southern District entered an order granting the Petitioner's motion for summary judgment and denying the Respondent's motion for summary judgment. *See* 776 F. Supp. 1368; (App. 44-54).

Upon the Respondent's appeal, the Seventh Circuit, on February 7, 1992, entered a judgment and an opinion affirming the Southern District's order. *See* 956 F.2d 635; (App. 34-43).

The Petitioner then filed a petition with the Southern District, seeking further relief based on the declaratory judgment, pursuant to 28 U.S.C. § 2202. On October 5, 1993, the Southern District denied, without a prior hearing, the Petitioner's request for further relief. (*See* App. 26-30). On the Petitioner's appeal, the Seventh Circuit, on June 6, 1995, entered a judgment and an opinion affirming the Southern District's order. *See* 57 F.3d 505; (App. 1-25). The Petitioner has not sought rehearing before the Seventh Circuit.

The jurisdiction of this Court to review the judgment and opinion of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCE INVOLVED

Constitutional Provisions

(1) Fifth Amendment, United States Constitution:

> [N]or shall private property be taken for public use, without just compensation.
>
> U.S. Const., amend. V.

(2) Fourteenth Amendment, United States Constitution:

No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const., amend. XIV, sec. 1.

(3) Indiana Constitution, Article I, Section 1:

Natural Rights. – WE DECLARE, that all people are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness . . . .

Ind. Const., art. I, sec. 1.

Statutes and Ordinance

(1) 28 U.S.C. § 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(2) 42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured at an action at law, suit in equity, or other proper proceeding for redress.

(3) Indiana Code 36-7-4-601(a). Purpose – Classification and Regulation.

(a) The legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance under the 600 series. However, no zoning ordinance may be adopted until a comprehensive plan has been approved for the jurisdiction under the 500 series of this chapter.

(4) Indiana Code 36-1-3-6(a). Procedures for Exercise of Powers.

(a) If there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner.

(5) Jay County, Indiana, Ordinance No. 1989-1 (Mar. 20, 1989), entitled "An Ordinace [sic] Concerning the Regulation of Solid Waste Disposal in Jay County, Indiana on Land Situated Outside of the Corporate Limits of any City or Town in Jay County, Indiana," is set forth in full in the Appendix at App. 71-75.

STATEMENT OF THE CASE

The Petitioner, Pro-Eco, Inc. ("Pro-Eco"), is an Indiana corporation engaged in the business of developing, constructing, and operating commercial sanitary landfills under permits issued by the Indiana Department of Environmental Management ("IDEM"). Pro-Eco began investigating Jay County, Indiana, in 1988 with an eye toward development of a parcel of land for use as a regional sanitary landfill. Pro-Eco purchased an option on a Jay County farm in September of 1988 in pursuit of that

interest. In order to determine the suitability of the land for use as a landfill, Pro-Eco expended funds for preliminary drilling and testing of the soil found on the property. In October, 1988, Pro-Eco retained an engineering firm as its consulting engineer on the Jay County project. The engineering firm began gathering the information necessary to file the appropriate applications for the state permits necessary to operate the landfill. The applications were to be reviewed by IDEM, the administrative agency created by Indiana's legislature which has authority to establish state-wide criteria for the environmentally safe operation of landfills.

Thereafter, Pro-Eco and its engineers engaged in preliminary meetings with IDEM to discuss their efforts thus far and their intentions regarding the operation of the Jay County landfill. Pro-Eco then engaged the services of another firm for more extensive engineering efforts, including further drilling and testing of the soil located on the Jay County farm. In February, 1989, Pro-Eco renewed its option to purchase the farm. By March 20, 1989, Pro-Eco had incurred expenses in the amount of $ 214,359.00, for its activities related to the initial evaluation of the Jay County farm regarding its suitability for a sanitary landfill and Pro-Eco's intention to file an application for the appropriate permits with IDEM. (*See* Joint Stipulated Facts in Support of Cross Motions for Summary Judgment, ¶ 21, at App. 61.)

Throughout the time that Pro-Eco was engaged in the evaluation and testing of the land, Jay County did not have in force any comprehensive land use controls or zoning ordinances, nor did the Board of Commissioners of Jay County, Indiana (the "Board"), have any plans to

implement any land use controls or zoning ordinances or even to determine whether any should be implemented.

At some time in early 1989, however, the Board became aware of Pro-Eco's activities in Jay County. At several meetings in February and March of 1989, the Board discussed what it perceived to be the public concern with landfills in Jay County. These discussions resulted in the Board's adoption of Ordinance No. 1989-1 (the "Ordinance"), which Ordinance purported to prohibit the location, construction, or operation of any public or commercial landfill within Jay County for a period of three years, or until such time as the Board could formulate and adopt an area-wide land use management plan containing provisions for the regulation of sanitary landfills, whichever came first. (*See* App. 71-75.)

As a direct result of the adoption of the Ordinance, Pro-Eco halted its activities and those of its engineers and drilling contractors in preparation for the application for the appropriate state permits to operate the landfill. Foreseeing the possibility of protracted litigation over the validity of the Ordinance, and understanding that its option to purchase the Jay County farm would likely expire before such litigation was ended, Pro-Eco exercised its option and purchased the Jay County farm on May 16, 1989.

Pro-Eco initiated this action in an Indiana state court, alleging in its original Complaint that the Board's adoption of the Ordinance was invalid, as it was unconstitutional, contrary to statute, and against public policy. Following a change of venue within the state courts and one amendment of Pro-Eco's Complaint, the action was

removed by the Board to the United States District Court for the Southern District of Indiana (the "District Court"), pursuant to 28 U.S.C. § 1441. The District Court's jurisdiction was invoked under 28 U.S.C. § 1331, and it then permitted Pro-Eco to file its Second Amended Complaint. This Second Amended Complaint formed the basis for all further proceedings in this cause.

In its Second Amended Complaint, Pro-Eco asserted that the Ordinance was invalidly adopted by the Board, in violation of the federal constitution, state and federal statutes, and state and federal public policy. The parties engaged in preliminary proceedings before the District Court, culminating in the filing of cross-motions for summary judgment. Pro-Eco's motion for summary judgment, as well as its response to the Board's motion for summary judgment, were based upon the same theories of recovery as those set forth in Pro-Eco's Second Amended Complaint. The District Court, however, seized upon only one of Pro-Eco's theories regarding the invalidity of the Ordinance, which became the basis of the District Court's initial order granting Pro-Eco's motion for summary judgment, denying the Board's motion, and declaring the Ordinance to be invalid. *See* 776 F. Supp. at 1371-72; (App. 50-54).

The Indiana legislature has enacted an extensive statutory scheme concerning the zoning of Indiana land. Each local governmental entity which is authorized to enact land use controls, whether it be a city or county, is required to follow the procedures set forth in the Local Planning and Zoning portion of the Indiana Code, codified at Ind. Code Ann. § 36-7-4-100 to -1342 (Burns 1989 & Supp. 1994). Specifically, Ind. Code Ann.

§ 36-7-4-601(a) provides that, while the "legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance[,] . . . no zoning ordinance may be adopted until a comprehensive plan has been approved for the jurisdiction[.]" *Id.*

The District Court, in its initial opinion, held that the ordinance enacted by the Board, although described by the Board as a "moratorium" on the construction of sanitary landfills, actually constituted a zoning ordinance enacted in contravention to Ind. Code Ann. § 36-7-4-601(a). *See* 776 F. Supp. at 1371-72; (App. 50-54). The Board admittedly had in place no comprehensive land use plan. (*See* App. 62, ¶ 23.) Nor had the Board even contemplated enacting such a plan prior to its discovery that Pro-Eco sought to develop and construct a landfill in Jay County. (*Id.*)

The District Court found additional support for its conclusion in Indiana's "Home Rule Act," which states that, "[i]f there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit [of local government] wanting to exercise the power must do so in that manner." Ind. Code Ann. § 36-1-3-6(a) (Burns 1993). The District Court found Ind. Code Ann. § 36-7-4-601(a) to be such a statutory provision requiring the Board to exercise its zoning power in a specific manner. Since it did not do so, the Board violated applicable Indiana statutory law. For that reason, the District Court found the Ordinance to be inappropriately enacted and thus invalid. 776 F. Supp. at 1371-72 (App. 50-54.)

The Board then appealed the District Court's determination to the Court of Appeals for the Seventh Circuit (the "Seventh Circuit"). The Seventh Circuit's opinion affirming the District Court's decision is reported at 956 F.2d 635 and reprinted in the Appendix at App. 34-43. The Seventh Circuit affirmed for the same reason given by the District Court, namely, that the manner in which the Board enacted the Ordinance was clearly in violation of Indiana law, specifically Ind. Code Ann. § 36-7-4-601(a), requiring the adoption of a comprehensive plan before any zoning ordinance may be enacted, and additional statutory and case law consistent therewith. 956 F.2d at 637-39; (App. 38-43).

One comment of the Seventh Circuit in that opinion is of particular note: The Seventh Circuit stated that it could not agree with the Board's contention that the Board was empowered to enact "an 'emergency, interim measure' designed to 'preserve the status quo.' " 956 F.2d at 638; (App. 42). To do so "would allow the Board to frustrate the Indiana statutory framework for orderly zoning by enacting a temporary and unspecific moratorium whenever the Board perceived that an individual planned an undesirable use." *Id.*

Following its successful defense on this first appeal, Pro-Eco next sought further relief from the District Court, pursuant to 28 U.S.C. § 2202. On May 21, 1992, Pro-Eco filed its motion for further relief based on the declaratory judgment with the District Court. Pro-Eco again set forth the facts pertaining to its exploration of Jay County in hopes of operating a sanitary landfill therein, along with

references to the District Court's prior judgment declaring the Ordinance invalid, and the Seventh Circuit's judgment affirming the District Court's declaratory judgment.

Pro-Eco sought further relief under the legal theory that the manner in which the board had inappropriately enacted the invalid ordinance deprived Pro-Eco of its rights, privileges, and immunities secured by the Federal Constitution, in violation of 42 U.S.C. § 1983. Pro-Eco claimed that: (1) the Board had taken valuable property of Pro-Eco for public use without just compensation, in violation of Pro-Eco's rights under the Fifth and Fourteenth Amendments to the United States Constitution; (2) the Board's enactment of the Ordinance in blatant disregard of Indiana statutory law deprived Pro-Eco of its liberty and property interests without due process of law, in violation of the Fourteenth Amendment to the United States Constitution; and (3) the Board singled out Pro-Eco as the only entity seeking to construct and operate a new sanitary landfill in Jay County, thus excluding Pro-Eco from engaging in a lawful business, and thereby denying Pro-Eco its rights to equal protection of the law, in violation of the Fourteenth Amendment to the United States Constitution.

Pro-Eco then sought to have the District Court hold a hearing wherein Pro-Eco would have an opportunity to present evidence and arguments concerning the constitutional violations and ensuing damages which Pro-Eco had suffered as a result of the Board's improper exercise of its zoning power. The District Court issued an order on November 30, 1992, in which it noted that it had previously declared the Ordinance to be invalid, null and void. (*See* App. 31.) The District Court went on to state that it

did possess "the authority to hold such a hearing and determine the damages based on the declaratory judgment ruling[,]" and added that, "prior to any hearing, it is unclear as to what kinds of damages, if any, to which [sic] Pro-Eco may be entitled." (*Id.* at 31-32.)

The District Court then recognized that Pro-Eco sought monetary relief pursuant to 42 U.S.C. § 1983, to compensate Pro-Eco for the various constitutional violations which Pro-Eco had alleged in its motion for further relief based on its declaratory judgment. It noted that such claims had been timely filed but that the District Court desired, "in order to determine the theory on which Pro-Eco bases its claim for damages, [and] the nature of the damages sought," additional briefing on those subjects. (App. 32.) Both Pro-Eco and the Board complied with the District Court's briefing schedule.

Nevertheless, the District Court refused to permit Pro-Eco the opportunity to present evidence and arguments as to its damages at a hearing, as contemplated by 28 U.S.C. § 2202. In its order of October 5, 1993, by which it denied Pro-Eco's request for further relief, the District Court again recognized that "§ 2202 allows the Court to proceed to hear damage claims that arise from the Declaratory Judgment." (App. 26.) The District Court, however, took 28 U.S.C. § 2202's "qualification . . . that the relief sought must be 'based on' the declaratory judgment" to mean that, "if relief can be granted without further factual findings other than the type or amount of damages, then a motion for further relief under the declaratory judgment scheme would be appropriate after a hearing." (*Id.*)

The District Court denied Pro-Eco's motion for a § 2202 hearing for two reasons. First, the District Court stated that it would have to make further findings of fact "in order for the plaintiff [Pro-Eco] to get relief on any of its theories[.]" (App. 28.) "Thus, the requested relief requires further factual findings not in the Court's view 'based' on the finding the Court previously made that the moratorium was null and void." (*Id.*) Secondly, the District Court stated that it did not believe the Federal Constitution protected Pro-Eco from what the District Court termed "business risks." (App. 29.)

Pro-Eco appealed this determination to the Seventh Circuit. It is the Seventh Circuit's judgment and opinion of June 6, 1995, affirming the District Court's denial of further relief, which Pro-Eco now asks this Court to review.

In its opinion of June 6, 1995, the Seventh Circuit characterized the lower court's order as follows: "The district court denied Pro-Eco's motion because it did not believe Pro-Eco's claims were 'based on' the original declaratory judgment, as § 2202 requires, and because Pro-Eco could not demonstrate a constitutionally protected property interest." 57 F.3d at 508; (App. 4). Because the Seventh Circuit concluded that "Pro-Eco has not alleged facts that would entitle it to relief on any of its stated theories of recovery," that court refused to "examine whether [Pro-Eco's] claim is based on the original declaratory judgment act." 57 F.3d at 508; (App. 4-5).

The Seventh Circuit then went on to dismiss each of Pro-Eco's constitutional claims in sequence. Although the claims which Pro-Eco seeks to have reviewed will be

discussed in further detail in the explanation of Reasons for Granting the Writ, it may be helpful to briefly summarize the Seventh Circuit's decision here. The Seventh Circuit denied Pro-Eco's claim under the Fifth Amendment's taking clause because it felt that Pro-Eco had not established that it held a protected property interest in either the Jay County farm, the option contract to purchase the farm, which option Pro-Eco held at the time the Board inappropriately attempted to enact the Ordinance, or the right guaranteed by Indiana law to engage in a lawful business. 57 F.3d at 508-512; (App. 5-15).

The Seventh Circuit then found that Pro-Eco had not asserted a procedural due process violation under the Fourteenth Amendment to the United States Constitution by merely asserting that the Board violated the procedural requisites established under Indiana law pursuant to Ind. Code Ann. § 36-7-4-601(a). 57 F.3d 512-14; (App. 15-18). The Seventh Circuit held, also, that Pro-Eco's substantive due process challenge, under the Fourteenth Amendment, failed because Pro-Eco could not demonstrate either that the Ordinance infringed upon a fundamental liberty interest of Pro-Eco's, or that the Ordinance was " 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' " 57 F.3d 514 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); (App. 18-20). The court found that the Board's recitations in the preamble of the Ordinance, regarding potential public health concerns, provided a sufficient reasonable basis for the Board's adoption of the Ordinance. For the same reason, the Court denied Pro-Eco's claim for relief under the

Fourteenth Amendment's equal protection clause. 57 F.3d at 514-515; (App. 19-21).

For all of these reasons, the Seventh Circuit affirmed the District Court's judgment on the grounds that Pro-Eco could not prove its claims under the various constitutional theories which it had advanced. This, the Seventh Circuit did, even though it failed to address the question of whether Pro-Eco should have been granted a hearing, at which hearing Pro-Eco could have presented further evidence and arguments in support of its constitutional claims and concomitant damages.

REASONS FOR GRANTING THE WRIT

I.

The questions of when a plaintiff's claims for further relief are "based on" a previously entered declaratory judgment, and whether such claims for further relief can be denied without the hearing contemplated by 28 U.S.C. § 2202, are important questions which have not been addressed by this Court, the resolution of which is necessary to reduce confusion and conflict in the lower federal courts.

By refusing to address the District Court's decision that Pro-Eco's claims were not "based on" the declaratory judgment, and the closely intertwined question of whether 28 U.S.C. § 2202 requires a hearing before a district court may deny further relief, *see* 57 F.3d at 508; (App. 4-5), the Seventh Circuit has presented this Court with the opportunity to decide an important federal statutory question of first impression.

This Court has never addressed the statutory prerequisites to the award of further relief based on a declaratory judgment, as permitted by 28 U.S.C. § 2202. Indeed, this Court has merely made reference to § 2202 in only a very few cases, and then primarily only while describing the circumstances regarding the inception of those instant cases. *See, e.g., Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 130 L.Ed.2d 740, 115 S.Ct. 810 (1995); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 310 n.2 (1976); *Buckley v. Valeo*, 424 U.S. 1, 8 (1976). In none of these cases, or any other, has this Court been presented squarely with the issues of (a) when further relief is "based on" a previously entered declaratory judgment, and (b) whether such further claims for relief may be denied without the hearing referenced in 28 U.S.C. § 2202. This case provides an opportunity for the Court to decide those questions.

Additionally, and somewhat surprisingly, given the "long history" of the Declaratory Judgment Act, *see Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 773 n.14 (1st Cir. 1994), there are few cases from the lower federal courts explaining what § 2202 means when it says that further claims for relief must be "based on" the prior declaratory judgment. Those cases which do discuss this issue, however, present a conflict, at least in principle, with the tacit understanding of the Seventh Circuit, and the explicit holding of the District Court below, that Pro-Eco's claims for relief were not "based on" the prior declaratory judgment in its favor. In *Commercial Union Ins. Co.*, for example, the Court of Appeals for the First Circuit noted that § 2202 recognizes "the *cumulative* nature of the declaratory device by authorizing a district

court to grant additional relief *consistent with* the underlying declaration even though the right to the relief may arise long after the court has entered its declaratory judgment." *Id.* at 773 (emphasis added) (footnote omitted); *see also Gant v. Grand Lodge of Texas*, 12 F.3d 998, 1002 (10th Cir. 1993), *cert. denied*, 128 L.Ed.2d 462, 114 S.Ct. 1834 (1994). Furthermore, as the Tenth Circuit recognized in *Gant*, § 2202 " 'authorizes the court to grant relief that was not demanded or relief that was not even proved in the original declaratory judgment action. . . . Any additional facts that may be necessary to support the award of further relief can be proved on the hearing provided for by the statute.' " *Gant*, 12 F.3d at 1002 (quoting 10 Charles A. Wright et al., *Federal Practice and Procedure* § 2771, at 765-67 (2d ed. 1983)).

Similarly, the Court of Appeals for the Fourth Circuit has reiterated that the further relief sought " 'need not have been demanded *or even proved* in the original action for declaratory relief.' " *Insurance Servs. of Beaufort, Inc. v. Aetna Cas. & Sur. Co.*, 966 F.2d 847, 851 (4th Cir. 1992) (quoting *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958)) (emphasis in original). The Fourth Circuit continued, noting that the " 'power of the court to retain jurisdiction to give complete and effectual relief is well established, and it follows without any serious controversy that the court may make such further orders to give effect to a declaratory judgment as shall seem meet and proper.' " *Insurance Servs. of Beaufort*, 966 F.2d at 852 (quoting Anderson, *Actions for Declaratory Judgments* § 451 (2d ed. 1951 & Supp. 1991)).

Furthermore, the Fourth Circuit expressly considered the issue of whether "the district court erred in failing to hold a full hearing on the issue of damages" before denying the plaintiff's requested further relief. *Insurance Servs. of Beaufort*, 966 F.2d at 852. In that case, as in the instant action, "[t]he district court only requested and considered briefs from the parties on the issue of damages" and then denied the plaintiff relief without holding a hearing. *Id.* at 849, 852. Unlike the instant case, however, the plaintiff therein did not request an oral hearing on the issue of damages, as Pro-Eco did. The Fourth Circuit, nevertheless, noted that "[e]rror in the application of the statutory requirements of the Declaratory Judgment Act is an error in conclusion of law which is reviewed *de novo*" and held that it was "error, as a matter of law, for the district court to fail to hold a hearing on the issue of damages." *Id.*

In a sentence which seems almost prescient in light of the circumstances of this action, the Fourth Circuit asserted: "It goes almost without saying that in an ordinary civil action, a court is not entitled to rule on contested damages from briefs without a hearing." *Id.* at 853. The Fourth Circuit likewise analogized to Rule 55 of the Federal Rules of Civil Procedure, which implies that a default judgment should not be entered without a full hearing unless the damages are liquidated or otherwise uncontested. *See Gant*, 966 F.2d at 852; Fed. R. Civ. P. 55.

The Fourth Circuit recognized, however, that a "hearing may not always be required where the factual issues concerning such further relief are sufficiently developed at trial, because the parties would have had their hearing at trial." *Id.* at 854 n.4. Where, however, the district court

notes that "after trial it had insufficient information to make an award of 'further relief' under 28 U.S.C. § 2202[,]" *id.*, a hearing is necessary. The Fourth Circuit remanded the case, instructing the district to hold a hearing on the issue of damages. *Id.* at 854. In the instant cause, the District Court for the Southern District Court of Indiana recognized in its order dated November 30, 1992, that, "prior to any hearing, it is unclear as to what kinds of damages, if any, to which [sic] Pro-Eco may be entitled." (App. 31-32.) Since the District Court recognized that it would require a hearing to determine whether Pro-Eco was entitled to damages, it erred in failing to hold such a hearing.

Moreover, the Seventh Circuit erred in failing to consider Pro-Eco's contentions on this point in its judgment and opinion rendered in this action on June 6, 1995. *See* 57 F.3d at 508; (App. 4-5). The Seventh Circuit's tacit approval of the District Court's determination that Pro-Eco was not entitled to a hearing at which Pro-Eco could provide further support for its claims for additional relief "based on" the declaratory judgment previously entered in its favor, conflicts with the decisions of the First, Fourth, and Tenth Circuits, as explained above.

Additionally, and perhaps more importantly, the Seventh Circuit's failure to address this statutory issue, in favor of leaping ahead to decide issues of constitutional import, which issues Pro-Eco never had the chance to fully develop before the District Court, flies in the face and conflicts in principle with the long-standing tradition of this Court that, "normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v.*

McMillan, 466 U.S. 48, 51 (1984) (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) ("Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")). Where a federal court of appeals has improvidently decided a constitutional question, even though the disposition of the case may rest alternatively upon statutory grounds, this Court has determined that the statutory "question should be decided in the first instance by the Court of Appeals" and, "therefore, that the proper course is to vacate the judgment of the Court of Appeals, and remand the case to that court for consideration of the [statutory] question[.]" *Escambia County*, 466 U.S. at 51.

II.

The decision below that Pro-Eco did not have a protected property interest is in conflict with Indiana law, when viewed in the context of which property interests are protected under the Fifth and Fourteenth Amendments to the United States Constitution.

Pro-Eco's first constitutional claim was based on the takings clause of the Fifth Amendment. The Seventh Circuit determined that Pro-Eco had failed to allege facts sufficient to support its claim that it possessed a property interest which could be protected under the takings clause. 57 F.3d at 508-12; (App. 4-15).

It is true that, at the time the Board improperly enacted the invalid Ordinance, Pro-Eco had only entered into an option contract to purchase the Jay County farm.

The Seventh Circuit looked to the law of Indiana to determine whether Indiana recognized a property right in such an option contract. Although the Seventh Circuit agreed that some states, such as California, "recognize[ ] a compensable property right in unexercised options to purchase real estate[,]" it found that "Indiana, apparently, does not." 57 F.3d at 509; (App. 6).

The Seventh Circuit reached this conclusion in error, however, by selectively editing out important distinguishing characteristics from the Indiana cases upon which it based its decision. The Seventh Circuit found that "Indiana courts have explicitly stated that an option to buy real estate 'does not create in the . . . optionee an interest in the property upon which recovery may be had after the same has been taken by eminent domain.' " 57 F.3d at 509 (citing *Haney v. Denny*, 193 N.E.2d 648, 654 (Ind. Ct. App. 1963); *Coons v. Baird*, 265 N.E.2d 727, 731 (Ind. Ct. App. 1970); *Butsch v. Swallow*, 134 N.E. 877, 878 (Ind. Ct. App. 1922)); (App. 6-7).

The crucial wording deleted from the above quote, however, indicates that this rule applies to a "lessee and *future* optionee[.]" *Haney*, 193 N.E.2d at 654 (emphasis added). The *Haney* court was faced with the question of whether a lessee of real property, under a lease containing a provision regarding an option to purchase, which option had not yet ripened for the lessee, held a protected property interest in the lease and *future option*. *See id.* It does not stand for the proposition that an optionee can never hold a protected property interest.

The *Haney* court went on to note that one who merely holds an option to purchase land being taken by the

power of eminent domain " 'has no interest in the land which will entitle him to compensation, although there is some authority to the effect that, if such option is exercised after the condemnation, the holder thereof is entitled to claim the damages awarded, less the purchase money payable to the owner.' " *Haney*, 193 N.E.2d at 654 (quoting 29 C.J.S., *Eminent Domain* § 196). In this proceeding, it is undisputed that Pro-Eco did, in fact, exercise its option and purchased the Jay County farm pursuant to its contract. (App. 64, ¶ 33.) Thus, because it exercised its option, Pro-Eco may have held a sufficient property interest under Indiana law to be entitled to an award in a condemnation proceeding.

The other two cases cited by the Seventh Circuit, *Coons* and *Butsch*, are distinguishable because they deal with the option holder's right to property vis-a-vis the party who had given the option, and not vis-a-vis the government which may have acted to deprive the option holder of whatever property interest he possesses in the land or the option contract itself under the Fifth and Fourteenth Amendments' protection of compensable property rights. Although the definition of a property interest under the Fifth Amendment is not coterminous with that of the Fourteenth Amendment, *see* 57 F.3d at 513; (App. 15), it is helpful to look to Fourteenth Amendment cases in order to determine whether a Fifth Amendment property interest may exist.

As this Court has previously recognized, the property interests protected by the due process clause of the Fourteenth Amendment "extend well beyond ownership of real estate, chattels, or money." *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972). Under Indiana law construing

the due process clause, "a property interest may be created by 'ordinance or contract[.]' " *Kennedy v. McCarty*, 778 F. Supp. 1465, 1473 (S.D. Ind. 1991) (quoting *McQueeney v. Glenn*, 400 N.E.2d 806, 810 (Ind. Ct. App. 1980), *cert. denied*, 449 U.S. 1125 (1981)).

This Court has also recognized that, for a person to claim a property interest in a benefit, "he must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. In this case, Pro-Eco did have a legitimate claim of entitlement to the Jay County farm. An option to purchase real property is an enforceable contract if consideration has been given for it. *Burke v. Mead*, 64 N.E. 880, 882 (Ind. 1902). In the giving of an option, a property owner " 'does not sell his property, but he does subject himself to the liability of having to convey the property *if the option is exercised within the time and in the manner stipulated.*' " *Coons*, 265 N.E.2d at 731 (quoting *Bandy v. Myers*, 227 N.E.2d 183, 185 (Ind. Ct. App. 1967)) (emphasis in original). Pro-Eco maintained an enforceable option contract for the purchase of the Jay County farm, which it duly exercised by purchasing the farm on May 16, 1989. At the time of the Board's adoption of the Ordinance, Pro-Eco maintained a ripened option contract which it merely had to exercise in order to possess full fee ownership of the Jay County farm.

Perhaps more important than its decision regarding the existence of a property right in the option contract, though, is the Seventh Circuit's overtly flippant dismissal of Pro-Eco's claim that it held a protected property right in its "right to do business," *see* 57 F.3d at 511 n.5; (App.

10), which is guaranteed by the Constitution of the State of Indiana and case law arising thereunder.

Indiana law recognizes the " 'right inherent in all people . . . to follow any of the common occupations of life. Every individual possesses as a form of property, the right to pursue any calling, business or profession he may choose.' " *Eaton Corp. v. Appliance Valves Corp.*, 526 F. Supp. 1172, 1180 (N.D. Ind. 1981), *aff'd* 688 F.2d 842 (7th Cir. 1982) (quoting *Continental Car-Na-Var Corp. v. Moseley*, 148 P.2d 9, 12-13 (Cal. 1944)). As indicated in the citation, *Eaton Corp.* was affirmed by the Seventh Circuit itself. It has also been recognized in a case decided by the Supreme Court of Indiana, that "[t]he right of an individual to engage in a lawful business and to fix the price at which he disposes of his own property is a part of his inalienable right to 'liberty and the pursuit of happiness' and is guaranteed by both our State and Federal Constitutions." *Bissell Carpet Sweeper Co. v. Shane Co.*, 143 N.E.2d 415, 422-23 (Ind. 1957) (Bobbit, J., concurring in part).

The Indiana Constitution, in Article I, Section 1, gives explicit protection to the inalienable rights of life, liberty, and the pursuit of happiness. Ind. Const., art. I, § 1. The Supreme Court of Indiana long ago recognized the practical import of this clause. In 1856, Judge Perkins wrote:

> It thus appears conceded that rights existed anterior to the constitution – that we did not derive them from it, but established it to secure to us the enjoyment of them; and it here becomes important to ascertain with some degree of precision what these rights, natural rights, are.

> . . . "The absolute [or natural] rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property;" not some property, or one kind of property, but, at least, whatsoever the society organizing government, recognizes as property. How much does this right embrace, how far does it extend? It undoubtedly extends to the right of pursuing the trades of manufacturing, buying, and selling, and to the practice of using. These acts are but means of acquiring and enjoying, and are absolutely necessary and incidental to them. What, we may ask, is the right of property worth, stripped of the right of producing and using? "The right of property is equally invaded by obstructing the free employment of the means of production, as by violently depriving the proprietor of the product of his land."
>
> . . . This great natural right of using our liberty in pursuing trade and business for the acquisition of property, and of pursuing our happiness in using it, though not secure in Europe from the invasions of omnipotent parliaments, or executives, is secured to us by our constitutions.

Herman v. The State, 8 Ind. 545, 556-57 (Ind. 1856). Let there be no doubt that Indiana recognizes a significant property interest in the right to carry on a lawful business. Pro-Eco merely asks to be given the chance to use this property interest in showing that the Board deprived Pro-Eco of its "distinct investment-backed expectations[,]" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), thereby taking a portion of Pro-Eco's

property without just compensation, in violation of the Fifth and Fourteenth Amendments.

The decision of the Seventh Circuit thus conflicts with prior decisions of this Court, in principle, and with the law of the State of Indiana directly, in determining what is to be deemed a compensable property interest for constitutional purposes.

III.

The Seventh Circuit erred in its application of substantive due process principles to the actions of the Board in adopting the invalid Ordinance.

The Seventh Circuit determined that Pro-Eco had failed to allege sufficient facts to support its theory of a substantive due process violation. 57 F.3d at 508, 514; (App. 4, 18-20). What the Seventh Circuit ignored, however, is that Pro-Eco has never had an opportunity to fully develop the facts which might entitle Pro-Eco to recovery upon the theory of substantive due process. The Seventh Circuit considered only its earlier affirmance of the declaratory judgment which had declared the Ordinance to be invalid because it was not in technical, procedural compliance with Indiana statutory law, and ignored the District Court's denial of the evidentiary hearing requested by Pro-Eco pursuant to 28 U.S.C. § 2202.

The Seventh Circuit denied Pro-Eco's claims of a substantive due process violation because it determined Pro-Eco could not demonstrate that the Ordinance impinged upon a fundamental liberty interest, or that the Ordinance was " 'arbitrary and unreasonable, having no

substantial relation to the public health, safety, morals, or general welfare.' " 57 F.3d at 514 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); (App. 18). The Seventh Circuit, however, was never presented with all the facts relevant to an appropriate determination of whether the Board had acted in an arbitrary and unreasonable manner because Pro-Eco was never granted a hearing to set forth the additional facts and arguments pertaining to that question.

The Seventh Circuit opined as if the only fact relevant to the determination of Pro-Eco's substantive due process claim was that the District Court had earlier invalidated the Ordinance, and the Seventh Circuit itself had affirmed the invalidation, on the grounds that the zoning ordinance had been enacted without the proper procedural prerequisite of a comprehensive land use plan. *See* 57 F.3d at 514; (App. 18). Certainly, the failure of the Board to have in place a comprehensive land use plan was the reason utilized by the District Court and the Seventh Circuit in adjudging the Ordinance to be invalid in the first place. Nevertheless, Pro-Eco was never fully able to develop its argument that the Board's actions were arbitrary and unreasonable because Pro-Eco was never given the opportunity of a hearing to present further facts relevant to that determination.

The Seventh Circuit noted that it has previously "interpreted 'arbitrary and unreasonable' to mean invidious or irrational." 57 F.3d at 514; (App. 18-19). In an earlier decision, the Seventh Circuit shed additional light on this topic, stating that, in the context of zoning and

land use regulation, a "particular decision or action is 'arbitrary' if it is reached 'without adequate determining principle or was unreasoned.' " *Scudder v. Town of Greendale, Indiana*, 704 F.2d 999, 1002 (7th Cir. 1983) (quoting *United States v. Carmack*, 329 U.S. 230, 243 (1946)).

In this proceeding, there exists no such adequate determining principle. The Seventh Circuit relied upon the Board's self-serving statement in the preamble to the Ordinance, wherein the Board stated that " 'the construction and operation of public or commercial sanitary landfills constitutes a use of property that may create serious, permanent, and irreversible environmental damage and may unnecessarily endanger the public health, safety, or welfare of the citizens of Jay County, Indiana . . . . ' " 57 F.3d at 514; (App. 19); (*see also* App. 71). It noted, too, that the Ordinance also identified the absence of any existing land use plan for protection from such a supposedly "pernicious use of the land." 57 F.3d at 514; (App. 19).

Had the Board actually sought to protect the County's health, safety and welfare, it clearly could have sought to engage in zoning or planing well before 1989. In fact, the whole purpose for requiring a comprehensive land use plan prior to the enactment of the zoning ordinance is that the comprehensive plan is to be developed with an eye toward "the promotion of public health, safety, morals, convenience, order or the general welfare and for the sake of efficiency and economy in the process of development." Ind. Code Ann. § 36-7-4-501 (Burns 1989). The Board had ample opportunity to cause a comprehensive plan to be prepared and to enact a zoning ordinance. But it had not done so, or even contemplated doing so, prior to March, 1989.

This fact indicates that the Board may not have been acting wholly out of a concern with the public health, safety, and welfare of the citizens of Jay County. The Board simply raised a roadblock in front of Pro-Eco, in its quest to operate a properly permitted sanitary landfill, by threatening Pro-Eco with a fine of $5,000.00 per day if it were to begin operating such a landfill in Jay County. (*See* App. 74.) Pro-Eco was never given the opportunity to raise such an argument before the District Court and thus had no opportunity to have the Seventh Circuit review evidence concerning all of the circumstances surrounding the Ordinance's adoption. Furthermore, Pro-Eco was not allowed to present to the District Court or the Seventh Circuit evidence regarding other circumstances surrounding the Board's activity, which Pro-Eco believes would have proved the arbitrary and unreasonable nature of the Board's conduct, including its deliberate attempts to circumvent the public policy set forth by the State of Indiana in its statutes and regulations concerning the operation of sanitary landfills.

Pro-Eco had argued in support of its original motion for summary judgment regarding the invalidity of the Ordinance, that Indiana had enacted a detailed regulatory scheme for the permitting of sanitary landfills throughout the State of Indiana by IDEM. Pro-Eco further argued that Jay County intentionally sought to impede the operation of the state permitting scheme by enacting the invalid Ordinance. Additional reasons were presented why the Board's Ordinance should be invalid, none of which were discussed by the District Court in its order of September 20, 1990. *See* 776 F. Supp. 1368; (App. 44-54). Pro-Eco has thus never had the opportunity to argue these points on

the issue of whether the Board acted in an arbitrary and unreasonable manner in enacting an invalid Ordinance.

Pro-Eco believes that, if it had been given the opportunity to present all of its evidence at a § 2202 hearing, Pro-Eco would have shown that there was far more than a simple failure to comply with the technical, procedural requirements of the state statutes at issue here, and that the District Court and Seventh Circuit would then have been able to determine that the Board's actions were, in fact, arbitrary and unreasonable, and thereby deprived Pro-Eco of its substantive due process rights.

CONCLUSION

For all the reasons stated above, the Petitioner, Pro-Eco, Inc., respectfully prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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PRO-ECO, INC., Plaintiff-Appellant,

v.

BOARD OF COMMISSIONERS OF
JAY COUNTY, INDIANA,
Defendant-Appellee.

No. 93-3566.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 14, 1995.

Decided June 6, 1995.

Landowner sought declaratory judgment challenging legality of county's moratorium on landfills. The United States District Court for the Southern District of Indiana, Larry J. McKinney, J., 776 F.Supp. 1368, entered summary judgment in favor of landowner, and appeal was taken. The Court of Appeals, 956 F.2d 635, affirmed. Landowner then petitioned for further relief. The District Court denied petition. Landowner appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) de novo review was appropriate; (2) landowner was not entitled to recover under takings clause; (3) county did not violate procedural due process; (4) moratorium did not violate substantive due process or equal protection; and (5) county was immune from tort liability.

Affirmed.

David V. Miller (argued), F. Wesley Bowers, George C. Barnett, Jr., Cedric Hustace, Bowers, Harrison, Kent & Miller, Evansville, IN, for plaintiff-appellant Pro-Eco, Inc.

David R. Warshauer, Robert D. MacGill, Peter J. Rusthoven (argued), Barnes & Thornburg, Indianapolis,

IN, Bradley K. Burkett, Whiteman, Shappell & Burkett, Portland, IN, Rosemary G. Spalding, Price & Barker, Indianapolis, IN, for defendant-appellee Bd. of Com'rs of Jay County, Ind.

Before WOOD, Jr., COFFEY, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

Pro-Eco seeks damages against the Jay County Board of Commissioners ("the Board") that allegedly stem from an illegal landfill moratorium ordinance ("ordinance" or "moratorium") which the Board passed in 1989 to prevent Pro-Eco from building a landfill in Jay County. Pro-Eco obtained a declaratory judgment under 28 U.S.C. § 2201 invalidating the ordinance, and we affirmed that judgment on appeal. *Pro-Eco v. Board of Comm'rs of Jay County, Ind.*, 956 F.2d 635 (7th Cir. 1992) *("Pro-Eco I").*

Pro-Eco now seeks further relief under 28 U.S.C. § 2202. It alleges under 42 U.S.C. § 1983 that, in enacting the ordinance barring landfills in Jay County, the Board took Pro-Eco's property without paying compensation and violated Pro-Eco's constitutional rights to due process and equal protection. Pro-Eco also alleges that the Board violated its rights under Indiana tort law by interfering with its "right to do business." The district court denied Pro-Eco's petition for further relief, concluding that Pro-Eco's claims were not "based on" the earlier declaratory judgment, as § 2202 requires. The district court also concluded that Pro-Eco is precluded from obtaining the damages it seeks because it did not have a protected interest in the land it wanted to use for a

landfill when the Board passed the ordinance. Pro-Eco appeals.

In reviewing the district court's denial of Pro-Eco's petition for further relief, we assume familiarity with the background facts as set forth in *Pro-Eco I*, fleshing out additional facts as they become necessary.

I. Standard of Review

The parties not only disagree on whether further relief ought to be available to Pro-Eco, they also disagree about the standard through which we should review the district court's action. Pro-Eco suggests we review the district court *de novo*. The Board argues for the more deferential abuse of discretion standard.

Section 2202, under which Pro-Eco brings this claim, provides as follows:

> Further necessary and proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

The statute's use of the term "may be granted" suggests that courts have some discretion in awarding further relief. Section 2201, the provision creating the right to bring a declaratory judgment action, uses similar discretionary language ("any court of the United States may declare the rights . . . " 28 U.S.C. § 2201). Our circuit decided, after a period of inconsistency, that the discretion afforded by § 2201 lies with the court of appeals, not the district court. *See Tempco Elec. Heater Corp. v. Omega Eng'g*, 819 F.2d 746, 747 (7th Cir. 1987). Recognizing that

"whether to allow a declaratory judgment action to proceed . . . calls for 'discretion hardened by experience into rule,' " that is, it calls for a uniform standard in the circuit, we review *de novo* decisions of the district courts under 28 U.S.C. § 2201. *Id.* at 749.

In this case, we review the district court's denial of Pro-Eco's motion for further relief, a motion brought under 28 U.S.C. § 2202, not § 2201. The district court denied Pro-Eco's motion because it did not believe Pro-Eco's claims were "based on" the original declaratory judgment, as § 2202 requires, and because Pro-Eco could not demonstrate a constitutionally protected property interest. In light of this posture, with the district court deciding the case on pure questions of law, and in light of our circuit's decision to guard jealously the discretion afforded under the Declaratory Judgment Act, we will review the district court's denial of Pro-Eco's motion *de novo*.[1] Additionally, because we conclude that Pro-Eco has not alleged facts that would entitle it to relief on any of its stated theories of recovery, we do not examine

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[1] Although we do not decide the issue here, we note that whether a motion for further relief under § 2202 is "based on" a prior declaratory judgment is the sort of issue that calls for general uniformity in the circuit, just as deciding under what general circumstances a declaratory judgment may be available calls for uniformity. We express no opinion as to the proper standard of review of a district court's decision under § 2202 that decides questions of fact, such as the amount of damages to be awarded. We affirm today because the plaintiff has not stated any viable theory of recovery, a decision that should always be susceptible to *de novo* review regardless of whether the claim is brought through the vehicle of the Declaratory Judgment Act.

whether its claim is based on the original declaratory judgment act.

II. Whether Pro-Eco Has Stated Viable Theories of Recovery

A. The Takings Clause

Pro-Eco alleges that, when the Board invalidly enacted the ordinance prohibiting the operation of a landfill in Jay County, the Board took Pro-Eco's property within the meaning of the Fifth Amendment's Takings Clause and that the Board must now pay Pro-Eco compensation for the property. But when the Board acted, Pro-Eco did not own the land it intended to buy for the landfill. Instead, Pro-Eco had only an option to buy the property. Pro-Eco argues that, even if it did not have a compensable property interest in the land itself, its option to buy the land amounted to a compensable property interest.

Pro-Eco analogizes its posture to that of the plaintiffs in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), where the Nollans, lessees with an option to purchase land, wanted to build on the land in order to satisfy their obligation under the option so they could buy the land. The California Coastal Commission conditioned a building permit on the Nollans' grant of an easement across a strip of the land to afford the public a better view of, and better access to, the beach. The Nollans protested the condition and began the arduous journey of appeals, writs, hearings, etc. either to have the condition struck or to make the government pay compensation. Eventually, a California Superior Court granted the Nollans' writ of mandamus and ordered that

the condition be struck from the permit. The commission appealed to the California Court of Appeal, but, in the meantime, the Nollans built their house, thereby satisfying their obligation on the option, and purchased the land. The Court of Appeal reversed the Superior Court and also found that no taking had occurred because the easement would not deprive the Nollans of all reasonable use of their property. The U.S. Supreme Court reversed the California Court of Appeal and found a taking. *Id.*, 483 U.S. at 841, 107 S.Ct. at 3151.

Pro-Eco argues that, because it exercised its option to buy the land at issue at an earlier time in the litigation process than did the Nollans, we should conclude that Pro-Eco has an even stronger property interest than the Nollans had. The relevant inquiry for takings, however, is not whether a claimant acquires property early enough in the litigation process. It is whether the claimant had a recognized property interest at the time the government entity acted. When evaluating takings claims, courts look to the law of the state wherein the taking allegedly occurred to find whether what was allegedly taken was compensable property. *Ruckleshaus v. Monsanto,* 467 U.S. 986, 1001, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 815 (1984). The Nollans had a lease and an option when the California Coastal Commission acted. California recognizes a compensable property right in unexercised options to purchase real estate. *San Diego County v. Miller,* 13 Cal. 3d 684, 693, 532 P.2d 139, 144, 119 Cal. Rptr. 491, 496 (Cal. 1975). Indiana, apparently, does not.

Indiana courts have explicitly stated that an option to buy real estate "does not create in the . . . optionee an interest in the property upon which recovery may be had

after the same has been taken by eminent domain." *Haney v. Denny*, 135 Ind. App. 317, 335, 193 N.E.2d 648, 654 (Ind. Ct. App. 1963); *see also Coons v. Baird*, 148 Ind. App. 250, 255, 265 N.E.2d 727, 731 (Ind. Ct. App. 1970); *Butsch v. Swallow*, 78 Ind. App. 101, 106, 134 N.E. 877, 878 (Ind. Ct. App. 1922).

Pro-Eco proposes no difference, and we conceive of none, between an option to purchase real estate that is frustrated by eminent domain proceedings and an option to buy land that is frustrated by a zoning regulation. Therefore, we conclude that, under Indiana law as indicated by *Haney*, *Coons*, and *Butsch*, Pro-Eco had no interest in the land at the time the ordinance passed.

But what about the option contract itself, apart from the real estate with which it is concerned: is it property in itself for which the owner must be compensated if its value is destroyed by a zoning regulation that goes too far? In *Peick v. Pension Benefit Guarantee Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984), we denied the takings claims of parties to a multiemployer pension fund who challenged portions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) which required the employers, when they withdrew from the pension fund, to pay more into the fund than they had agreed among themselves to pay. In denying their takings claim, we relied on a Supreme Court statement in *United States v. Security Indus. Bank*, 459 U.S. 70, 75, 103 S.Ct. 407, 411-12, 74 L.Ed.2d 235 (1982), that, in the context of denying the takings claims of creditors whose liens were impaired by the Bankruptcy Reform Act of 1978, the property right of a secured party to collateral is "quite different in legal

contemplation" from the creditor's contract right to repayment of the debt. Collateral affords something closer to the bundle of rights we normally associate with property protected under the Takings Clause than a contract to be repaid. *Peick*, 724 F.2d at 1276. Accordingly, we concluded that the Supreme Court did not view the Takings Clause as protecting mere contract rights. *Id.*

In *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 224, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166 (1986), the Supreme Court noted that "the fact that legislation disregards or destroys existing contractual rights does not *always* transform the regulation into an illegal taking." (Emphasis added). *Connolly* was very similar to *Peick* in that the claimants were trustees to multiemployer benefit plans who alleged that the MPPAA took their property by forcing them to pay more when withdrawing from a plan than they had agreed among themselves to pay. *Connolly* stated that, "If the regulatory power is otherwise within the power of Congress . . . its application may not be defeated by private contractual provisions," and therefore such contractual provisions, even if destroyed by the regulation, do not always entitle the parties to compensation from the government. *Id.* The Court would not say that contractual rights are never property,[2] but it did not

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[2] We read *Connolly*, in conjunction with the line of authority stating that we should look to states to find property rights under the Takings Clause, as effectively overruling, if it had not already been overruled, *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1933), to the extent that it flatly holds that contracts are property that the government may not take without compensation. *Lynch* dealt with War Risk Insurance policies, policies through which the United States insured the

find them compensable in *Connolly*, where the United States took nothing for its own use and Congress nullified a contractual provision only by acting within its powers. *Id.*, 475 U.S. at 224, 106 S.Ct at 1025-26.[3]

Indiana will not even go so far as to say that an option to buy property is a regular contract; instead, "it is a proposition by one party, for consideration, which must be accepted within the specified time, in the precise terms named, before it becomes a binding contract." *Haney*, 135 Ind. App. at 335, 193 N.E.2d at 654; *see also Coons*, 148 Ind. App. at 255, 265 N.E.2d at 731; *Butsch*, 78 Ind. App. at 106, 134 N.E. at 878 (noting that "It has been many times held that an option to purchase gives no right of property in and to the thing which is the subject of the option. It is not a sale. It is not even an agreement for a sale.").[4]

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lives of veterans. Congress repealed the policies, but the Court allowed the petitioners to proceed with claims that they had been deprived of the value of their contracts without due process. The Court appeared to collapse the due process and takings issues in light of the fact that the government was a party to the contract, resulting in what looks more like a suit for breach of contract. The *Lynch* analysis does not resemble the takings jurisprudence of today, and, in light of *Connolly*, we do not believe it controls.

[3] The *Connolly* Court then went on to engage in the sort of analysis that Pro-Eco advocated here, one encompassing an evaluation of the regulation's economic impact on the claimant's "distinct investment-backed expectations." *Id.*, 475 U.S. at 225, 106 S.Ct. at 1026. However, that analysis assumed for the sake of discussion some degree of property rights in order to show that the petitioners could not fulfill other necessary elements of a takings claim. We feel no need to do the same.

[4] Indiana does recognize, however, that the owner of land has a legally enforceable obligation to contract to sell his land to

Given Indiana's decision that options to buy real estate do not create property rights in real estate (and the U.S. Supreme Court's position on the status of contracts under the Takings Clause), we conclude that Pro-Eco's option to buy real estate in Jay County is not a property interest protected by the Takings Clause. Allowing Pro-Eco to proceed with a takings claim based on its option to buy land would frustrate Indiana's policy of holding such option holders at arm's length from the land the option concerns. Indiana does not see fit to protect holders of options to buy land against others who claim an interest in the land, so we should not grant Pro-Eco more rights through the back door of recognizing its option contract as property for purposes of the Takings Clause, especially when Indiana does not even recognize options as full-fledged contracts.[5] In short, the Board did not "interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute

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the option holder upon the election of the option holder to fulfill its obligations under the option. *Romain v. A. Howard Wholesale Co.*, 506 N.E.2d 1124, 1127 (Ind. Ct. App. 1987).

[5] Grasping for any sort of property rights, Pro-Eco also alleges that Indiana recognizes a "right to do business," which Pro-Eco wants us to extrapolate into a property right compensable under the Takings Clause (it cites no Indiana cases doing so). Regardless of whether Indiana recognizes such a right in the abstract, we will not override Indiana's explicit proscription against asserting options as property rights under the Takings Clause with Pro-Eco's assertion of a nebulous substantive right that, apparently, has no basis in any traditional notions of property rights.

'property' for Fifth Amendment [Takings Clause] purposes." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-25, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).

Moreover, we will not allow Pro-Eco to contract away the Board's right to develop a zoning plan. *See Connolly*, 475 U.S. at 224, 106 S.Ct. at 1025 (noting that "[i]f the regulatory statute is otherwise within the powers of Congress . . . its application may not be defeated by private contractual provisions"). Pro-Eco rightly asserts that the Board acted outside of its powers in enacting the moratorium. However, the Board acted outside of its powers only in that it did not follow the proper procedures prescribed by the Indiana legislature. Pro-Eco does not challenge the Board's authority to enact a moratorium if it follows the proper procedures, and indeed the Board has the authority to enact zoning moratoria. *See* IND. CODE ANN. § 36-7-4-601(a) (West 1994) (granting the body with jurisdiction over a geographic area the exclusive authority to enact a zoning ordinance); *see also Penn Central*, 438 U.S. at 129, 98 S.Ct. at 2661 (recognizing that municipalities may generally enact land use controls to enhance the area's quality of life).

The Board here was in much the same position as Congress was in *Connolly*, acting within its substantive powers, not appropriating any property for the government's use. If local governments had to pay compensation for every contract they frustrated when enacting ordinances within their substantive powers, localities would eventually lose their abilities to govern themselves. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922) (noting that "Government could hardly go on if to some extent values

incident to property could not be diminished without paying for every such change in the general law.")[6]

Pro-Eco also alleges a taking occurred during the period after it bought the property but before the moratorium was invalidated, a time during which Pro-Eco was stymied in its efforts to develop the property as it wished. The Takings Clause does cover temporary takings for the period before an invalid land use control is struck down. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987). However, the plaintiff in *First English* already owned the land affected before Los Angeles County enacted the ordinance that temporarily took it. Here, Pro-Eco has deliberately run into the Board's fist. Pro-Eco knew at the time it bought the land that the Board's ordinance would hinder their

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[6] In the analogous arena of due process, where property rights are generally broader, see *infra* at 513, the Supreme Court has declined to find a property right belonging to nursing home patients where the government rescinded the license of the nursing home: the patients were merely indirect beneficiaries of the government certification of the home. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980). The Court declined to find a property right partially because of the unpredictability of the number of property interests such a finding would create. *Id.* The same problem exists with regard to Pro-Eco's option to buy land. Pro-Eco's option contract is analogous to the nursing home patients in *O'Bannon* in that Pro-Eco benefits only indirectly from the landowner's right to the land in fee simple. We find troublesome the unpredictable number of beneficiaries of someone else's fee simple that might claim compensation from the government if we were to recognize a blanket compensable property right in contracts.

efforts to develop the land however they wished, even if only temporarily. In *In Re Thompson*, 867 F.2d 416, 422 (7th Cir. 1989), where we denied a bank's claim that a congressionally enacted lien avoidance statute took the bank's security interest, we noted that

> lien avoidance is not a taking when it is authorized *before* the creditor makes the secured loan in question. . . . There is no taking when the creditor is simply told that if he extends security to a borrower who later goes bankrupt, he may not be able to enforce his security interest to the hilt. He can protect his security by reducing the amount of the loan or refusing to deal with borrowers who are not fully creditworthy; he can demand compensation for the added risk by charging a higher interest rate; he can demand additional collateral; or he can take some combination of these self-protective measures. In effect he can arrange compensation in advance for the taking of his security interest; he has no need to invoke the protection of the just-compensation clause of the Fifth Amendment.

Id. at 422.

The *Thompson* analysis applies here. While the landfill moratorium may have diminished the land's value to Pro-Eco, Pro-Eco could have arranged compensation in advance by paying less for the land. If Pro-Eco thought it would not be able to develop the property as a landfill because of the ordinance, then it surely valued the property less, paid a proportionately smaller amount, and must have seen some other value in owning the land. If, on the other hand, Pro-Eco fully expected the ordinance to be invalidated, Pro-Eco likely paid the price at which it valued the land for use as a landfill less a discount for the hassle and delay that it would endure in taking action to

invalidate the ordinance. To allow Pro-Eco further compensation under the Takings Clause would overvalue the land.[7] *Thompson* explicitly refused to rule that no prospective curtailment of property rights would ever violate the Takings Clause. *Id.* But we will not allow Pro-Eco to pursue compensation from the Board when Pro-Eco could have averted any diminution in value the moratorium inflicted upon the land.[8]

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[7] In the context of eminent domain proceedings, courts have noted that "Generally, only persons with ownership interests at the time of the taking are entitled to compensation for a taking." *United States v. 99.66 Acres of Land*, 970 F.2d 651, 658-9 (9th Cir. 1992); *Milens of Cal. v. Richmond Redevelopment Agency*, 665 F.2d 906, 909 (9th Cir. 1982).

[8] As another theory for asserting a property interest, Pro-Eco alleges that it spent in excess of $200,000 on development work on the land it eventually bought before the board enacted the moratorium. Such expenditures, Pro-Eco argues, show that it had a distinct, investment-backed expectation in developing the land, as the Supreme Court has required in order for a taking to occur. *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. A distinct, investment-backed expectation, however, is not a substitute for the ownership of compensable property; it is a factor supplemental to the ownership of compensable property that courts should consider in deciding whether a taking has occurred. *See id.*, 438 U.S. at 124, 98 S.Ct. at 2659 (describing as a relevant consideration in examining whether a regulation amounts to a taking, where the claimant owned the land affected by the regulation, "the extent to which the regulation has interfered with distinct investment-backed expectations."). And allowing this theory of property would be tantamount to recognizing a constitutionally created compensable property right, which we may not do under the Takings Clause. *See Ruckleshaus*, 467 U.S. at 1001, 104 S.Ct. at 2872 (noting that we look to state law for protected property rights).

B. 42 U.S.C. § 1983 Claims

Pro-Eco next alleges that it has a cause of action against the Board under 42 U.S.C. § 1983. According to Pro-Eco, the Board, in enacting the invalid moratorium, deprived Pro-Eco of its rights to procedural due process, substantive due process, and equal protection, all guaranteed by the 14th Amendment to the Constitution.

1. "Procedural" Due Process

The 14th Amendment protects persons from state governmental deprivations of life, liberty, or property without due process of law. U.S. CONST. AMEND. 14. Pro-Eco asserts that the Board deprived it of a property interest and argues as if it had a property interest in the land at the time the Board acted. As our discussion above noted, Pro-Eco had no property interest in the land or in its option to buy the land for purposes of the Takings Clause. But, property as contemplated by the Takings Clause and property as contemplated by the Due Process Clause cannot be coterminous. If they were, we would end up with former welfare recipients whose benefits the state had otherwise properly ended claiming that the state must pay them the fair market value of their benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 255, 90 S.Ct. 1011, 1013, 25 L.Ed.2d 287 (1970) (holding that welfare benefits may not be taken away without giving the recipient notice and an opportunity to be heard); *Schroeder v. City of Chicago*, 927 F.2d 957, 961 (7th Cir. 1991) (concluding that the Takings Clause does not apply to allegedly improper removal of welfare benefits). The Due Process Clause, then, recognizes a wider range of interests as property

than does the Takings Clause. However, even assuming that Pro-Eco's option could be construed as property under the Due Process Clause and that the Board's action somehow deprived Pro-Eco of the value of its option, Pro-Eco cannot show that it was deprived of due process.

The Board is an elected body that acted legislatively in enacting the moratorium. It did not deny Pro-Eco a permit or variance; rather, it enacted a generally applicable ordinance. Governing bodies may enact generally applicable laws, that is, they may legislate, without affording affected parties so much as notice and an opportunity to be heard. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915). "The fact that a statute (or statute-like regulation) applies across the board provides a substitute safeguard." *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984) (citing *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245-46, 93 S.Ct. 810, 821, 35 L.Ed.2d 223 (1973)). It is likely, as Pro-Eco asserts, that the Board acted specifically because it saw Pro-Eco's landfill coming, and we have noted that "more [process] may be required . . . where the legislation affects only a tiny class of people -- maybe a class with only one member." *Philly's*, 732 F.2d at 93. The Supreme Court, however, has held that even the functional equivalent of a petition for a variance may be put to a referendum. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679, 96 S.Ct. 2358, 2365, 49 L.Ed.2d 132 (1976). We do not believe that generally applicable prophylactic legislation provoked by the fear of one particular actor converts an elected body's legislative act into a quasijudicial or administrative act that would require

more process.[9] *See Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973) (finding no adjudication, and therefore no need for an individual hearing, where a general rule applied to a class that included only one member but remained open to possible future members and there was such a community of interest in the regulation as to make rulemaking effective).

But we need not decide how little process the Board could have given here; Pro-Eco admits that it knew of the public hearing the Board held to discuss and adopt the moratorium and that a Pro-Eco representative attended that hearing. It does not allege, moreover, that its representative was denied an opportunity to speak. This is all "that due process in zoning could possibly be thought to require. . . . " *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988).

Pro-Eco insists that, because the Board allegedly did not follow the state statutes providing for public hearings, notice of those hearings, and Advisory Plan Commission input to be given to a Board of Commissioners when it promulgates zoning ordinances, it necessarily denied Pro-Eco, and presumably anyone who had their property values diminished by the moratorium, due process because there was no meaningful opportunity for interested parties to be heard on the matter. According to

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[9] If an ordinance professed general applicability, but it were so specific in describing the prohibited acts that only one actor could ever come within its purview, the ordinance might amount to a bill of attainder and no manner of process would be sufficient. U.S. CONST. ART. I § 10; *Falls v. Town of Dyer, Ind.*, 875 F.2d 146, 147 (7th Cir.1989).

Pro-Eco, only if the Jay County Advisory Plan Commission had reviewed the proposed moratorium and given the Board input could Pro-Eco have had a meaningful opportunity to be heard.

This is incorrect. The Constitution does not guarantee anyone the right to a master land use plan proposed by an advisory plan commission before a zoning moratorium can be enacted. Or, more generally, "A violation of state law is not a denial of due process of law." *Coniston*, 844 F.2d at 467; *see also River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994). Pro-Eco has already gotten relief for the Board's violation of the state procedural statute in the form of invalidation of the ordinance. Section 1983 affords relief only if the Constitution is offended, and a violation of a state procedural statute does not offend it.

2. "Substantive" Due Process

Pro-Eco also claims that the Board's ordinance deprived Pro-Eco of its substantive due process rights. In order to claim that a zoning ordinance interferes with its substantive rights, Pro-Eco must be able to demonstrate either that the ordinance infringes a fundamental liberty interest, *Reno v. Flores*, ___ U.S. ___, ___, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993), or that the ordinance is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926). We have interpreted "arbitrary

and unreasonable" to mean invidious or irrational. *Coniston*, 844 F.2d at 467; *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987).

In *Mid-American Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286 (7th Cir. 1995), we noted that "[d]epositing garbage in landfills is not exactly a fundamental right. . . . Disposition of waste is a highly regulated industry. A claim that the Constitution protects this industry from public control . . . would bring nothing but belly laughs." *Id.* at 291. Moreover, "[c]orporations do not have fundamental rights . . . ;" "fundamental rights," a category that may include the liberty to contract, *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), describes only personal liberties. *Mid-American*, 49 F.3d at 291 (citation omitted).[10] So much for Pro-Eco's first avenue of recovery under the theory of substantive due process.

The Board's moratorium stated that "the construction and operation of public or commercial sanitary landfills constitutes a use of property that may create serious, permanent, and irreversible environmental damage and may unnecessarily endanger the public health, safety, or welfare of the citizens of Jay County, Indiana. . . . " The ordinance went on to note the absence of any countywide protection from such pernicious use of the land. Concern for public health is a sufficient reason on its face to pass

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[10] Shareholders of corporations may allege that a regulation that hinders the corporation invalidly curbs the shareholders' fundamental liberties, *Mid-American*, 49 F.3d at 291, but Pro-Eco litigates here as the corporation itself.

the *Euclid* test, and "governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction." *Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990) (citations omitted). In trying to protect the health, safety, and welfare of Jay County, the Board acted rationally; therefore, Pro-Eco's substantive due process rights claim must fail.

3. Equal Protection

Pro-Eco alleges that the moratorium violated its right to equal protection of the laws in two ways. First, it treated potential landfill developers differently than other developers. Because Pro-Eco does not claim to be a member of a suspect class whose different treatment at the hands of the government would be subject to strict or intermediate scrutiny, the same test of rationality we used for analysis of Pro-Eco's substantive rights claim applies to its equal protection claim. *Coniston*, 844 F.2d at 468. To state the standard in equal protection terms, as long as the Board had a rational basis for creating the classification and enacted the ordinance to achieve a legitimate government end, the moratorium satisfies the requirements of the Equal Protection Clause. *Cohen v. City of Des Plaines*, 8 F.3d 484, 494 (7th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2741, 129 L.Ed.2d 861 (1994).

We have already determined that the Board's goal, to protect the health, safety, and welfare of Jay County from the irreversible and pernicious social costs imposed by landfills, is legitimate. And prohibiting anyone from developing a landfill in Jay County seems a fairly

straight-forward, rational way to achieve that goal. Prohibiting all land development in Jay County would achieve the Board's goal, but it would also stifle other sorts of development, such as residential development, that the Board did not find pernicious.

But the moratorium was not rational in the eyes of Pro-Eco, who counters that the ordinance was irrational because, in enacting the ordinance, the Board deviated from state law and, therefore, had no reasonable expectation that the ordinance would be enforced. This characterization of the Board's act misses the mark: it does not address the rationality of the classification the Board drew. Moreover, if we bought this misdirected argument, we would negate our earlier proposition that violations of state procedural statutes do not amount to constitutional violations.

Pro-Eco's second basis for claiming an equal protection violation is that the Board singled out Pro-Eco for unfair and unequal treatment. Pro-Eco claims that the ordinance was unfair because it was apparently the only company with its eyes on developing a landfill in Jay County at the time the Board acted. Pro-Eco argues that unfair and purposeful discrimination in the enforcement of zoning regulations violates the Equal Protection Clause, citing *Scudder v. Town of Greendale, Ind.*, 704 F.2d 999, 1002-03 (7th Cir. 1983). Indeed, it may violate the Equal Protection Clause when "the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him. . . . " *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995); *see also Falls v. Town of Dyer, Ind.*, 875 F.2d 146 (7th Cir. 1989).

But Pro-Eco does not present us with a case of enforcement; it presents us with a case of enactment. Pro-Eco does not claim that the ordinance on its face applied only to it, or that other landfill developers were granted waivers and Pro-Eco was not. An ordinance generally applicable on its face but enforced for no legitimate reason against only an individual or a particular class may violate the Equal Protection Clause. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73, 30 L.Ed. 220 (1886); *Esmail*, 53 F.3d at 179-80; *Falls*, 875 F.2d 146. But legislatures may enact generally applicable legislation as a prophylactic to the danger posed by one particular actor as long as the end of the legislation is legitimate and, assuming the legislation does not distinguish between classes on bases susceptible to intermediate or strict scrutiny, the means are rationally related to the end. In other words, the fairness of which Pro-Eco speaks is always determined, in cases of low-level scrutiny, by the rationality of the state action, whether the questioned action is the enactment of an ordinance or the enforcement of it. The Board's action here, even if unabashedly directed at a threat only Pro-Eco posed, was legitimate.[11]

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[11] Again, the ordinance applied to anyone who wished to develop a landfill, but Pro-Eco claims that it violated the Equal Protection Clause because Pro-Eco was the only entity, at the time the ordinance was enacted, wishing to engage in the proscribed activity. We recognize that an ordinance may contain language of general applicability and still violate the Equal Protection Clause without a showing of unfair enforcement. But such a case would only arise where 1) the language of the statute, while not identifying any individual by name, could apply only to one person, and 2) such a classification would not rationally relate to a legitimate governmental end. In other

Pro-Eco has not stated facts to support a claim that Jay County engaged in unequal enforcement of the ordinance. The Board did not violate the Equal Protection Clause.

C. Indiana Tort Claim

Finally, Pro-Eco asserts a vague tort claim under Indiana law that it says guarantees Pro-Eco the "right to engage in a lawful business." Whatever the viability of such a claim under Indiana law, Pro-Eco may not proceed with it because Indiana provides immunity for local government entities from liability for loss resulting from "the adoption and enforcement of or failure to adopt and enforce a law. . . . " IND. CODE ANN. 34-4-16.5-3(7) (West 1995).

Pro-Eco argues that immunity does not apply because the Board acted outside of its statutory authority when it enacted the moratorium and that, therefore, the Board's action did not constitute discretionary authority. The Indiana Court of Appeals, in *Harvey v. Board of Comm'rs of Wabash County*, 416 N.E.2d 1296, 1299 (Ind.Ct.App.1981), read into adoption and enforcement immunity a requirement that the governmental entity act in a discretionary, rather than ministerial, capacity. It refused to find immunity for Wabash County against a lawsuit arising from an auto accident where the county decided to put up a road sign but failed to follow the

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words, a law of general application will not be constitutional if it amounts to bill of attainder, which Art. I, § 10 of the Constitution forbids to the states. *Falls*, 875 F.2d 146 (7th Cir. 1989).

legislatively prescribed quality control regulations when placing the signs. Once the county decided to place the signs, the Harvey court held, its discretionary functions ended, its ministerial functions began, and immunity fell away: "The question is 'Did Wabash County break the law?' Not 'Did Wabash County make the law?'." *Id.* at 1299.

The Indiana Supreme Court has modified adoption and enforcement immunity analysis, however. Now, instead of discerning between discretionary and ministerial functions, courts decide whether the allegedly tortious conduct was planning (immunity) or operational (no immunity) in nature. *Peavler v. Monroe County Bd. of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988). There, the court noted that "Tort immunity for basic planning and policy-making functions is necessary to avoid the chilling effect on the ability of the government to deal effectively with difficult policy issues which it confronts daily." *Id.* at 44. Those functions ought to be immune which involve "the exercise of political power which is held accountable only to the Constitution or the political process." *Id.* at 45 (citation omitted).

There may be cases where an elected governmental body decides through an immune, executive-style planning process to adopt a policy, and then becomes a potentially liable, operational body in carrying out its policy. But the adoption of an ordinance through a legislative process, even if it runs afoul of higher authority in some procedural manner, is a basic planning and policy-making function that should not be chilled by the prospect of common law tort liability. The most that could be said for the operational (or ministerial) functions of the Board

here is that they merged with the Board's discretionary functions into one action. We believe that the policy making capacity of the Board should control. That does not mean that ordinances enacted in violation of higher authority should stand, but remedies other than tort liability exist to strike down problematic laws, such as the remedy of declaratory judgment Pro-Eco obtained here. And, ultimately, the political process is the best remedy of all against an elected body.

III. Conclusion

For the foregoing reasons, the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PRO-ECO, INC., an Indiana Corporation, Plaintiff, v. THE BOARD OF COMMISSIONERS OF JAY COUNTY, INDIANA, a political subdivision of the State of Indiana, Defendant.	)	CAUSE NO. IP 89-577-C

ORDER

Plaintiff, after successfully voiding by Declaratory Judgment an attempt by defendant to halt its efforts to develop a sanitary landfill, now moves the Court for a hearing on damages. There seems to be ample authority that § 2202 allows the Court to proceed to hear damage claims that arise from the Declaratory Judgment. The qualification is that the relief sought must be "based on" the declaratory judgment. It seems to follow, therefore, that if relief can be granted without further factual findings other than the type or amount of damages, then a motion for further relief under the declaratory judgment scheme would be appropriate after a hearing.

The Court has found that the moratorium was an attempt to zone without having first established a comprehensive plan. This Court then found that the ordinance was invalid. Plaintiff asserts that this finding is

equivalent to a finding that the Court has found that the defendants' ordinance was illegal and violated State law.

Plaintiff alleges that that finding is tantamount to a finding that its constitutional rights to procedural due process and equal protection rights have been violated. Plaintiff asserts that the moratorium acted as an uncompensated taking of its right to develop its property as an interference with its investment-backed expectation. Plaintiff asserts that these are federal causes of action sanctioned by 42 U.S.C. § 1983.

Plaintiff entertains a further view that it has a right to conduct a lawful business and that right is a protected liberty interest. Plaintiff alleges also that the Board committed a tortious interference with its lawful right to do business. These claims are asserted as State claims.

Defendant reminds the Court of the stipulated fact that plaintiff at the time that the moratorium was passed was a holder of an option on the property in question and did not purchase the property until almost two months after the moratorium was passed and challenged. Defense also reminds the Court that at the time of the moratorium plaintiff still faced the long process of obtaining State permits for its operation. The Court notes that in plaintiff's brief of December 31, 1992, plaintiff asserts that it did not pursue the sanitary landfill permits because " . . . major changes in Indiana's solid waste management policies occurred during the period when the moratorium interdicted Pro-Eco's efforts to develop its Jay County site."

In order to implicate 42 U.S.C. § 1983, the basis of plaintiff's federal claims, the Court must make a finding

of more than the fact that the moratorium was invalid. *Coniston Corp. v. Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) states the general rule "A violation of state law is not denial of due process of law." Plaintiff is pursuing a substantive due process theory of the kind contemplated in the holding of *Parratt v. Taylor,* 451 U.S. 527 (1981).

Plaintiff ignores the fact that it exercised its option to purchase after the moratorium was passed. At the time of the alleged deprivation of rights, plaintiff was the holder of an option to purchase. Plaintiff ignores that even without the moratorium there were many barriers to its receiving a license to operate a sanitary landfill in Jay County. Plaintiff's only explanation as to why it has not continued to pursue the permit is that Indiana has changed its policies in waste management. The allegation is not that the law changed, the allegation is that policy changed.

The Court denies plaintiff's motion for hearing for two reasons. First, in order for the plaintiff to get relief on any of its theories, this Court would have to make substantial further findings of fact. These would include facts upon which the Court might based a conclusion that the passage of the moratorium was arbitrary, irrational, or unreasonable, and unconnected to any legitimate interest of the defendant Board. These would also necessitate an inquiry into the nature of the reasonableness of the investment based expectancy of plaintiff. Thus, the requested relief requires further factual findings not in the Court's view "based" on the finding the Court previously made that the moratorium was null and void.

Secondly, it is the Court's view that neither the Constitution nor Indiana case law protect those who take business risks. It is also this Court's opinion that plaintiff has not suffered constitutional harm merely by virtue of its perception that a prohibitive change in Indiana waste management policy now keeps it from operating a sanitary landfill on property that it purchased after the voided moratorium was passed. Its loss at its greatest is of an opportunity to attempt to get a license to operate a sanitary landfill. As was true of plaintiff in *Freese v. United States*, 639 F.2d 754, 758 (Ct. Cl. 1981) "At best, plaintiff has suffered a denial of the opportunity to obtain greater property (assuming that a sanitary landfill is more income productive than a farm) than that which he (it) owned upon the effective date of the Sawtooth Act (the moratorium).

For all these reasons, plaintiff's request for further relief is DENIED.

IT IS SO ORDERED this 5th day of October, 1993.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PRO-ECO, INC., an Indiana Corporation,	)	
Plaintiff,	)	No. IP 89-577-C
vs.	)	
BOARD OF COMMISSIONERS OF JAY COUNTY, INDIANA, a political subdivision of the State of Indiana,	)	
Defendant.	)	

ORDER

Plaintiff has filed a Request for Further Relief Based on Declaratory Judgment. The plaintiff is requesting that this Court set a hearing to determine the damages that Pro-Eco has suffered as a proximate result of the Board having improperly attempted to exercise its zoning authority. The Declaratory Judgment complaint asked that this Court declare that the ordinance which amounted to a moratorium on the development of new landfills in Jay County was void. This Court and the Appellate Court granted that relief. The ordinance was declared null and void as of September 20, 1990.

Both sides are in agreement that this Court does have the authority to hold such a hearing and determine the damages based on the declaratory judgment ruling. This Court acknowledges that in many instances courts have proceeded after the granting of declaratory relief to hear damage matters. In the instant case, prior to any hearing,

it is unclear as to what kinds of damages, if any, to which Pro-Eco may be entitled.

Plaintiff, in its Motion, suggests that the basis for its relief is 42 U.S.C. § 1983. It suggests that the unsuccessful attempt to zone away its right to develop a sanitary landfill is a taking under the due process clause of the Fourteenth Amendment.

Plaintiff claims that the liability of the Board of County Commissioners of Jay County has been established by the declaration that the ordinance was void. Plaintiff further asserts that since the summary judgment was submitted on stipulated facts the factual basis of its claim is established. Plaintiff then moves to the notion that it is now up to the Court to determine what constitutional or statutory violations have occurred as a matter of law because the facts are established.

The Court notes the defendants have not had an opportunity to address the § 1983 issue. Immunity issues need to be fully briefed. The Court finds that there was no compliance with the Tort Claims Statute. The Court further finds that the plaintiff's claims under § 1983 have been timely made. The Court, therefore, in order to determine the theory on which Pro-Eco bases its claim for damages, the nature of the damages sought, and to allow briefing on these subjects in a timely fashion now sets the following briefing schedule: Pro-Eco's brief to be filed by December 31, 1992, defendant's response to be filed by January 31, 1993, and Pro-Eco's reply to be filed by February 15, 1993.

IT IS SO ORDERED this 30th day of November, 1992.

/s/ Larry J. McKinney
LARRY J. McKINNEY,
JUDGE
United States District Court
Southern District of Indiana

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PRO-ECO, INC., Plaintiff-Appellee,

v.

BOARD OF COMMISSIONERS OF JAY COUNTY, INDIANA, Defendant-Appellant.

No. 90-3336.

United States Court of Appeals, Seventh Circuit.

Argued May 8, 1991.

Decided Feb. 7, 1992.

As Amended Feb. 7, 1992.

Landowner brought action under Indiana law to challenge county's sanitary landfill moratorium. On cross motions for summary judgment, the United States District Court for the Southern District of Indiana, Larry J. McKinney, J., 776 F.Supp. 1368, granted landowner's motion and appeal was taken. The Court of Appeals, Kanne, Circuit Judge, held that moratorium violated state zoning statutes.

Affirmed.

David V. Miller (argued), Cedric Hustace, Robert J. Dodson, Bowers, Harrison, Kent & Miller, Evansville, Ind., for plaintiff-appellee.

Rosemary G. Spalding (argued), Price & Shula, Indianapolis, Ind., Bradley K. Burkett, Whiteman, Shappell & Burkett, Portland, Ind., for defendant-appellant.

Before WOOD, Jr.,* COFFEY and KANNE, Circuit Judges.

KANNE, Circuit Judge.

In 1989, plaintiff Pro-Eco, Inc. ("Pro-Eco") prepared to purchase a farm in Jay County, Indiana, and transform it into a sanitary landfill. When the Board of Commissioners of Jay County, Indiana ("the Board") learned of Pro-Eco's plans, it adopted an ordinance barring anyone from developing any property as a sanitary landfill, until the Board was able to enact a comprehensive land use plan. The ordinance gave the Board three years to adopt such a plan. Pro-Eco then brought this suit alleging that the Board violated Indiana law as well as several provisions of the Constitution of the United States. Based upon a stipulated set of facts, the district court granted summary judgment for Pro-Eco, 776 F.Supp. 1368, on the ground that the Board's action in passing the moratorium was an unauthorized exercise of zoning power under Indiana law. The Board appeals. We affirm.

Pro-Eco is an Indiana Corporation which came to Jay County with an interest in developing a parcel of land for use as a sanitary landfill. In September 1988, Pro-Eco purchased an option on a Jay County farm for use as a possible site for its landfill. Pro-Eco authorized expenditures for preliminary drilling and testing on the property to determine its suitability for use as a landfill.

Between October 1988 and early 1989, Pro-Eco hired an engineering firm to gather the information necessary

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* Judge Wood, Jr., assumed senior status on Jan. 16, 1992, which was after oral argument in this case.

to allow it to file applications with the Indiana Department of Environmental Management ("IDEM"), which has authority to establish state-wide criteria for the environmentally safe operation of landfills. In November 1988, Pro-Eco and its engineers met with officials from IDEM to inform them of its intention to operate a landfill. From November 1988 to March 1989, Pro-Eco continued testing the Jay County property to prepare for a permit application. In February 1989, Pro-Eco renewed its option to purchase the Jay County farm. The record reflects that prior to March 1989 Pro-Eco spent $214,349 on planning the application and testing the site.

In early 1989, the Jay County Commissioners became aware of Pro-Eco's activities. In several meetings in February and March the Board discussed its concerns with the location of landfills in Jay County. On March 20, 1988, the Board adopted Ordinance No. 1989-1, § 1 of which prohibits the establishment of new sanitary landfills in Jay County until: (1) the adoption of an areawide land use management ordinance containing provisions for the regulation of sanitary landfills within Jay County; or (2) the expiration of three years from the date of the Ordinance.[1] Section 2 of the ordinance created an Area Land Use Management Committee and empowered the Committee to study Jay County's need for areawide planning specifically focusing on sanitary landfills. Section 2 allowed the Committee 180 days to complete its task. The ordinance included a finding by the Board that "serious,

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[1] At oral argument counsel for the Board conceded that the Board had the power to vote to extend the moratorium, although it might be subject to challenge.

permanent and irreversible environmental damage and unnecessary endangerment of public health, safety and welfare of the citizens of Jay County, Indiana, may occur by permitting the construction and operation of any new public or commercial sanitary landfills . . . prior to the adoption and implementation of proper controls regulating the location, construction and operation of public or commercial sanitary landfills."

As of March 19, 1990, when the parties submitted the joint submitted facts to the district court, the Board had not adopted any comprehensive land use plan. At that time, the only proposed plan disclosed by Jay County was no longer being considered by the Jay County Advisory Planning Commission.

After the ordinance was passed, Pro-Eco suspended its efforts to prepare an application to IDEM. On May 16, 1989, Pro-Eco purchased the Jay County farm. Shortly thereafter, Pro-Eco brought suit against the Board alleging that the ordinance violated Indiana law as well as several provisions of the United States Constitution.

After pre-trial proceedings, both parties moved for summary judgment. The district court granted Pro-Eco's motion and denied the Board's motion on the ground that the Board acted contrary to Indiana law in enacting the ordinance. The district court found that the ordinance was a zoning ordinance on the ground that it was "an attempt by the Board to regulate the use of a piece of property." The district court rejected the Board's contention that the ordinance could not be a zoning ordinance because it did not regulate the county by districts.

The district court further held that because the Board enacted the ordinance without first enacting, pursuant to statute, a comprehensive statutory plan, the Board had violated Indiana law. *See* IND.CODE ANN. § 36-7-4-601(a) (West Supp.1991). The district court also found that Indiana's "Home Rule" act, IND.CODE ANN. § 36-1-3-6(a) (West 1983) did not apply to shield the actions of the Board.

We review a grant of summary judgment *de novo*. *First Wisconsin Trust Co. v. Schroud*, 916 F.2d 394, 398 (7th Cir.1990). Where, as here, no issues of material fact exist, "we determine whether the moving party is entitled to judgment as a matter of law." *Id.*; FED.R.CIV.P. 56(c). In examining a grant of summary judgment, we must also " 'view the record and all inferences drawn from it in the light most favorable to the party opposing the motion.' " *Kreutzer v. A.O. Smith Corporation*, 951 F.2d 739, 743 (7th Cir.1991), (quoting *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir.1990)).

As the district court recognized, the principal issue is whether the ordinance passed by the Board is a zoning ordinance. If the ordinance enacted by the Board is a zoning ordinance, it is clearly in violation of Indiana law. Section 36-7-4-601(a) (West Supp.1991) provides that:

> The legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance under the 600 series. However, *no zoning ordinance may be adopted until a comprehensive plan has been approved* for the jurisdiction under the 500 series of this chapter. (Emphasis added).

Indiana courts have strictly construed the powers conferred by the zoning statute. In *K.G. Horton & Sons, Inc. v. Board of Zoning Appeals of Madison County*, 235 Ind. 510, 135 N.E.2d 243 (Ind.1956), the court held that, under a prior version of the Indiana statute at issue here, a temporary zoning ordinance was invalid because the defendant Board of Zoning Appeals had not previously enacted a master plan.

In *Horton*, the county adopted an interim zoning ordinance which was to remain in effect until the adoption of a comprehensive zoning ordinance but was not to have a duration in excess of one year. Each year, until 1955, the Board readopted the ordinance. The developer challenged the 1955 extension of the ordinance. In 1947, the Zoning Act became effective.[2] Under that act a county could not enact a zoning ordinance until the final report of the plan commission had been received by the Board of County Commissioners. The defendant county never adopted a comprehensive plan. The court held that the interim ordinance adopted in 1955 was void because "it was beyond the statutory power of the Board of Commissioners," *Horton*, 135 N.E.2d at 246, although it noted that the interim ordinance adopted before the effective date of the Zoning Act was valid. The court stated that the readoption of the interim zoning ordinance in 1955 without a master long range plan did not comply with the 1947 Zoning Act. The court stated that "upon the expiration of the ordinance, on April 1, 1948, it could not be readopted

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[2] Section 56 of the 1947 Zoning Act is the predecessor of IND.CODE § 36-7-4-601(a). 1947 Indiana Acts, Ch. 174, § 56.

except as a part of a master long range plan under the procedures prescribed by the 1947 Zoning Act." *Id.*

Hundt v. Costello, 480 N.E.2d 284 (Ind.Ct.App.1985) is also consistent with the holding of *Horton*. In *Hundt*, the defendant city extended its jurisdictional area to encompass a site for a landfill. *Id.* at 285. At that time, the city had adopted a master plan and a zoning ordinance. The city then amended its zoning ordinance to permit the landfill. The court upheld the amendment of the ordinance, citing the public interest in the creation of new sanitary landfills. The court noted that it would have held the amendment void if the city had not had a master plan in effect at the time of the amendment. *Id.*

Other Indiana decisions are consistent with *Horton* as well. In *City of Crown Point v. Lake County,* 510 N.E.2d 684 (Ind.1987), the court noted that a comprehensive land use "plan is carried out through local zoning ordinances." *Id.* at 686 (citing, IND.CODE ANN. § 36-7-4-601-614 (Burns 1986 Supp.)). *See also South Bend Transp. v. City of South Bend,* 428 N.E.2d 217, 225 (Ind.1981) (following *Horton* to state that boards of county commissioners "possess only such powers as have been granted expressly by statute and those which must be necessarily implied to execute some expressed power"). Thus, the Board must lose if the moratorium is a zoning ordinance.

Under Indiana law, a zoning ordinance is "an ordinance adopted under the 600 series of I.C. 36-7-4 or under prior law." IND.CODE ANN. § 36-7-1-22 (West Supp.1991). The Board argues that the ordinance is not a zoning ordinance because it does not regulate the use of any particular piece of property. Stated another way, the Board claims that the terms

"zoning" and "regulating" have different meanings under Indiana law. The Board claims that, as applied to local governments, the term "regulate" includes "license, inspect, or prohibit." IND.CODE ANN. § 36-1-2-15 (West 1983). The Board claims that " 'zoning' is the separation of a municipality into districts or 'zones' and the regulation of each district as to the structure, nature and use of buildings and land." 5 P. Rohan, *Zoning and Land Use Controls* § 37.01[1]. The Board therefore claims that the ordinance cannot be a zoning ordinance because it does not divide the county into various zones.

We do not disagree with the various definitions of zoning cited by the Board. We conclude, however, that the Board's version of the definition of zoning is inconsistent with Indiana's statutory framework for zoning because it is far too narrow to do justice to the plain meaning of Indiana's zoning statutes. Another authority defines zoning as:

> * * * the regulation by districts of the building development and uses of property, and its essence is a territorial division according to the character of land and structures and their peculiar suitability for particular uses and the uniformity of use within the division. The essential object of zoning regulations is to stabilize property uses and preserve the character of neighborhoods, and they may be intended to guide the future development of uses of land in certain areas and to protect such areas during transition periods in connection with anticipated future development.

30 I.L.E., *Zoning*, § 1, p. 635 (1960).

In *Misner v. Presdorf*, 421 N.E.2d 684, 686 (Ind.Ct.App.1981), the court noted that "the ultimate purpose of zoning regulations is to confine certain classes of uses and structures to certain areas." Under a proper definition of zoning, such as the I.L.E. definition, a regulation, enacted after the preparation of a master plan pursuant to IND.CODE ANN. § 36-7-4-601(a) (West Supp.1991), which banned the construction of any landfills, or airports, or manufacturing plants in an entire county would certainly be a zoning ordinance. Thus, we cannot agree with the Board that a zoning ordinance must divide a county into districts.

The ordinance enacted by the Board is consistent with the definition of zoning in several other ways. First, in § 1, it attempts to permit nonconforming uses. *See Misner*, 421 N.E.2d at 686. The ordinance also stabilizes property uses in Jay County by preventing the creation of new sanitary landfills, and "preserves the character of existing neighborhoods." 30 I.L.E., *Zoning*, § 1. It also protects the entire county "during transition periods in connection with anticipated future development." *Id.* The Board itself admits that the ordinance is an "emergency, interim measure" designed to "preserve the status quo."

If we were to accept the Board's position it would allow the Board to frustrate the Indiana statutory framework for orderly zoning by enacting a temporary and unspecific moratorium whenever the Board perceived that an individual planned an undesirable use. Thus, the district court correctly concluded that the ordinance enacted by the Board was a zoning ordinance.

Furthermore, the Board's action was not protected by Indiana's Home Rule statute. A provision of that statute,

IND.CODE ANN. § 36-8-2-4 (West 1983) authorizes local governing units to "regulate . . . use . . . of property, that might endanger the public health, safety or welfare." By its own terms the Home Rule act does not apply to the moratorium issued by the Board. It provides that: "if there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner." IND.CODE ANN. § 36-1-3-6(a) (West 1983). *See also City of Crown Point*, 510 N.E.2d at 686 (noting that the zoning statutes, such as IND.CODE ANN. §§ 36-7-4-503 (West Supp.1991) and 36-7-4-601(b) (West Supp.1991), and not the Home Rule Act, IND.CODE ANN. § 36-1-3-4 (West 1983), grant counties the authority to regulate landfills). Thus, it is quite clear that a zoning ordinance is not governed by the Home Rule statute.

Because we conclude that the moratorium on new landfills enacted by the Board violated Indiana zoning statutes and is therefore void, we need not address Pro-Eco's other arguments. The district court properly granted summary judgment for Pro-Eco.

We AFFIRM the judgment of the district court.

PRO-ECO, INC., Plaintiff,

v.

BOARD OF COMMISSIONERS OF JAY COUNTY, INDIANA, Defendant.

No. IP 89-577-C.

United States District Court,
S.D. Indiana,
Indianapolis Division.

Sept. 20, 1990.

Landowner brought action under Indiana law to challenge county's sanitary landfill moratorium. On cross motions for summary judgment, the District Court, McKinney, J., held that: (1) moratorium constituted "zoning ordinance," within meaning of Indiana statute prohibiting passage of zoning ordinances without first passing a comprehensive zoning plan, and (2) "Home Rule" Act, requiring court to resolve issues of doubt of local government authority in favor of existence of authority, was inapplicable.

Landowner's motion granted; county board of commissioners' motion overruled.

David V. Miller, Cedric Hustace, Robert Jeff Dodson, Bowers Harrison Kent & Miller, Evansville, Ind., for plaintiff.

Rosemary G. Spalding, Price & Shula, Indianapolis, Ind., Bradley K. Burkett, Whiteman Shappel & Burkett, Portland, Ind., for defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

McKINNEY, District Judge.

The Plaintiff, Pro-Eco, and the Defendant, Board of Commissioners of Jay County, Indiana, have submitted this controversy to the Court on cross Motions for Summary Judgment. They have submitted stipulated facts. For the reasons stated below, the Court now GRANTS the Plaintiff's Motion and DENIES the Defendant's Motion.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Further, Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

While these rules were formerly viewed with some hostility by the federal courts and were sparingly used in disposing of insufficient claims or defenses, *see, e.g., Poller*

v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), the Supreme Court has instructed the district courts to follow the mandatory aspects of Rule 56 and enter summary judgment where appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The change in attitude has not gone unnoticed in the Seventh Circuit. *See e.g., Spellman v. Commissioners*, 845 F.2d 148, 152 (7th Cir.1988); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.1988), and must be followed by this district court where appropriate.

I. FINDINGS OF FACT

Pro-Eco is an Indiana Corporation that came to Jay County, Indiana, with an interest in developing a parcel of land for use as a sanitary landfill. Pro-Eco purchased an option on a Jay County farm owned by Jack Fisher in September of 1988 for $10,000 in pursuance of that interest. In an effort to determine the suitability of the land for use as a sanitary landfill, Pro-Eco authorized expenditures for preliminary drilling and testing on the property.

In October, 1988, the Donan engineering firm was retained as consulting engineer on the project. Donan proceeded to gather the information necessary to the filing of the appropriate applications for the issuance of State permits to operate the landfill. These applications were to be presented to the Indiana Department of Environmental Management (IDEM), the agency vested by the

Indiana State Legislature with the authority to establish state-wide criteria for the environmentally safe operation of land fills.

Donan reviewed the results of the preliminary drilling and testing in October of 1988. It then developed a second, more extensive, plan for the testing of the parcel's suitability for use as a landfill. In November, 1988, Pro-Eco and its engineers at Donan met with IDEM in a preliminary attempt to apprise the State agency of their efforts and their intentions for the operation. Test results, maps, monitoring wells, and other planning data were shared with the agency. These preliminary efforts did not, as plaintiff acknowledges, amount to the filing of an application for the required permit.

In November of 1988 Pro-Eco and Donan entered into another contractual relationship whereby more extensive engineering efforts would be expended looking toward the filing of the Solid Waste Facility Permit Application. Pro-Eco hired Greenbaum Associates for the drilling and related tasks. The appropriate drilling and testing continued through the end of 1988 and through March of 1989. In February of 1989 Pro-Eco renewed its option to purchase the Fisher farm. The option this time cost $15,000. Prior to March 1989, Pro-Eco had spent, for various planning and testing services, the total amount of $214,349. It had also authorized various in-house expenditures in executive and employee time.

During the time that Pro-Eco was engaging in the described testing and evaluation of the land, Jay County did not have in force a comprehensive land use control or zoning ordinance. There is no evidence that plans for the

implementation of any land use controls were under way prior to this time or that the possibility was being studied.

The Jay County Commissioners became cognizant of the activities of Pro-Eco sometime in early 1989. In several meetings held in February and March of 1989 the Board discussed its own and what it perceived was the public's concern with landfills. These discussions culminated in the duly promulgated ordinance over which the parties now litigate.

The ordinance in pertinent part reads as follows:[1]

> Section 1. *Sanitary Landfill Moratorium.* As of the effective date of this ordinance and notwithstanding any ordinance to the contrary, no public or commercial landfill, as defined in the Indiana Administrative Code, Title 330, Article 4, Rule 2-1(38) as recodified in Title 320.1 of the Indiana Administrative Code, may be located, constructed or operated on any land located within Jay County prior to the occurrence of the earlier of the following events: (a) the adoption by the Jay County Commissioners of an areawide land use management ordinance containing provisions for the regulation of sanitary landfills within Jay County, Indiana, or (b) three (3) years from and after the date of passage of this ordinance.

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[1] The entire ordinance need not be set out. Any further citations to the text of the ordinance will appear during discussion in the body of the text.

The ordinance in Section 2 establishes an Area Land Use Management Committee and empowers the Committee to study Jay County's need for area wide planning specifically focusing on sanitary landfills. The Committee was given the further responsibility of formulating its recommendations both on the need for county wide land use management and for the creation of a County plan commission. The committee was given 180 days to complete its task.

The ordinance further recognized a nexus between the public health, safety, and welfare of the citizens of Jay County and the regulation, location, construction, and operation of public commercial sanitary landfills. In addition the Commissioners expressed a concern that the operation of a sanitary landfill might create serious irreversible environmental damage.

As a direct result of the passage of the ordinance, Pro-Eco suspended its preparatory activities and those of its engineers and drilling contractors. By enacting the Ordinance the Jay County Board of Commissioners intended to prohibit the location, construction, or operation of any new public or commercial sanitary landfill in Jay County for three years or until the adoption of an area wide land use management ordinance containing provisions for the regulation of sanitary landfills within Jay County, whichever came first.

Pro-Eco purchased the property in question, notwithstanding the prior passage of the Ordinance and the uncertainty of Pro-Eco's ability to acquire a permit from the IDEM to construct and operate a sanitary landfill. The purchase was completed May 16, 1989.

II. DISCUSSION

The issue is properly framed as follows: can a board of county commissioners, upon learning of the existence of plans by a private company to acquire a permit from the State to operate a sanitary landfill in its county, and at a time when no zoning or land use ordinance exists, put a moratorium on the further development of all new landfills until a comprehensive zoning plan can be developed and established or until the passage of three years, whichever comes first?

Plaintiff argues that the moratorium passed by the Board of Commissioners is a zoning ordinance in itself and as such was done in violation of Indiana law which clearly prohibits the passage of zoning ordinances without first passing a comprehensive zoning plan. The statute upon which the Plaintiff relies for this argument reads as follows:

> § 36-7-4-601(a) The legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance under the 600 series. However, no zoning ordinance may be adopted until a comprehensive plan has been approved for the jurisdiction under the 500 series of this chapter.

Defendant argues first that the moratorium is not a prohibited zoning ordinance. It cites various definitions of "zoning" and concludes that the passing of the ordinance is not an exercise of the Board's power to zone.

Defendant also submits that there is statutory authority for its passage of the ordinance. That authority is the

"Home Rule" Act of 1980. The "Home Rule" provision of § 36-1-3-3(b) provides that any doubt as to the existence of a power of a local governmental unit other than a township is to be resolved in the favor of the local governmental unit. The County cites I.C. 36-1-3-3(b) as follows: "Any doubt as to the existence of a power of a unit shall be resolved in favor of its existence." Therefore, the County concludes that if there is some doubt about the authority of the county to pass the ordinance the doubt should be resolved in its favor.

The initial issue, therefore, is whether this moratorium ordinance is in fact "zoning". If it is not a zoning ordinance the inquiry is over. If the Court determines that it is an exercise of the zoning power of the County then the authority for the action must be examined. Certainly if this expression of local government is a zoning ordinance then it was passed in contravention of the above statute as all agree that it was passed without the prior passage of a comprehensive plan.

Despite the County's argument to the contrary, the moratorium is a zoning ordinance. The plain fact is that the ordinance is an attempt by the county to regulate the use of a piece of property. To say, as does the County, that this ordinance is not a zoning ordinance because it does not purport to regulate the county by districts is to ignore the general notion that an object of zoning is to regulate the use of land. See 30 I.L.E. 635 Zoning. To say that an ordinance which furthers the goals of zoning is not a zoning ordinance is less than convincing.

Having determined that the moratorium is indeed a zoning ordinance the Court is compelled to find that it

was passed in contravention of I.C. 36-7-4-601(a). The Legislature has been very direct in its statement that no zoning is to be done without first passing in the appropriate statutory manner a comprehensive plan. That statutory manner which has been bypassed in this instance includes notice to the public and hearings inviting input from the public and affected parties. This ordinance was, as is stipulated by the parties, passed without benefit of that statutory scheme.

The County directs the Court's attention to the "Home Rule" act as set out above. The County wishes to take advantage of the provision that requires the Court to resolve issues of doubt of local government authority in favor of the existence of the authority. Looking further into the "Home Rule" act, at I.C. 36-1-3-6(a), it states "if there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner." The zoning statute I.C. 36-7-4-100 *et seq.* is a statutory provision requiring a specific manner for exercising a power. There is, then, no doubt to resolve. The "Home Rule" act by its own terms does not apply to the issuance of this moratorium by the Jay County Commissioners. That power was exercised in this case contrary to the statute and therefore the plain meaning of the statute renders the zoning ordinance null and void.

Moratoriums by zoning bodies are not completely unheard of in the law. *In Schafer v. City of New Orleans,* 743 F.2d 1086 (5th Cir.1984), the City of New Orleans passed a moratorium on fast food restaurants in a particular area until such time as it could complete a study of the area or until the end of the year which was a 10 and

one half month period of time. Therein the Court observed

> Interim development controls such as this moratorium have been found to play an important role in municipal planning. They aid in "bridging the gap between planning and its implementation into legal measures." [from 3 Rohan, Zoning and Land Use Controls, § 22.01 at 22-2]. They may, as here, be used to preserve the status quo while study of the area and its needs is completed. This moratorium on land use serves a significant public purpose.

The critical difference between the situation in Schafer and in the case at bar, however, is that the City of New Orleans did have a comprehensive zoning ordinance. In addition, New Orleans was not operating under the specific language of the Indiana statute.

The County cites other cases that find that the legislative body has the inherent authority to pass interim zoning ordinances. The County quotes extensively from *SCA Chemical Waste Services, Inc. v. Konigsberg,* 636 S.W.2d 430 (Tenn.1982), a representative case among this group. The Court finds that the operative words from that opinion are:

> Assuming that the municipality has the legislative authority to adopt such [interim] ordinances . . .

Id. at 434-35.

None of the cases cited deal with Indiana's clear statutory scheme. In fact, some of these cases warn, as does *SCA Chemical,* that the interim ordinance can not stand unless the legislative authority to adopt the interim

zoning is present. As the Court has discussed above, Indiana has chosen through its state statute to permit zoning only after a comprehensive plan has been duly promulgated by the local body.

The Court, therefore, concludes that action of the County in passing the moratorium is an unauthorized exercise of zoning power. The Court further concludes that Indiana's "Home Rule" act does not supply the authority for the Jay County Commissioner's action. The Court finds the moratorium invalid. The summary judgment motion of Plaintiff Pro-Eco, Inc. is GRANTED and the summary judgment motion of the Jay County Board of Commissioners is OVERRULED. The parties to pay their own costs.

ALL OF WHICH IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PRO-ECO, INC., Plaintiff,	)	
v.	)	No. IP 89-577-C
BOARD OF COMMISSIONERS OF JAY COUNTY, INDIANA, Defendant.	)	(Filed Mar. 19, 1990)

JOINT STIPULATED FACTS IN SUPPORT OF CROSS MOTIONS FOR SUMMARY JUDGMENT

Comes now the plaintiff, Pro-Eco, Inc., by counsel, and the defendant, Board of Commissioners of Jay County, Indiana, by counsel, and submits the following as a Joint Stipulation of Facts for purposes of the parties' respective Cross-Motions for Summary Judgment.

1. Pro-Eco, Inc. ("Pro-Eco") is an Indiana corporation, in good standing upon the records of the Secretary of State and has its principal office located in Evansville, Indiana.

2. Jay County is a political subdivision of the State of Indiana.

3. The Board of Commissioners of Jay County ("Board") is the executive governing body of Jay County, having as its duly elected and currently serving members Walter R. Rodgers, Ernest Muhlenkamp and John D. Mink.

4. On or about August 1, 1988, Pro-Eco initiated inquiries with the offices of a licensed real estate broker in Portland, Jay County, Indiana for the purpose of investigating the possible purchase of real estate in Jay County.

5. The sole reason for Pro-Eco's interest in the possible purchase of real estate in Jay County was Pro-Eco's intention to develop, construct and operate a permitted and lawful sanitary landfill in the county after obtaining all required governmental authorization.

6. On or about September 2, 1988, Pro-Eco entered into a written Option Agreement, whereby Pro-Eco obtained from one Jack Fisher the right and option to purchase the following described real estate (the "Jay County Real Estate") located in Jay County, Indiana, to wit:

> The East Half of the Northeast Quarter of Section 16, Township 22 North, Range 13 East containing 80 acres, more or less,
>
> ALSO, the Southwest Quarter of the Northwest Quarter of Section 15, Township 22 North, Range 13 East, containing 40 acres more or less,
>
> ALSO, that part of the North Half of the Northwest Quarter of Section 15, Township 22 North, Range 13 East which lies west of the Winchester & Fort Wayne State Road containing 39 acres, more or less. Containing in all 159 acres but subject to all legal highways.
>
> EXCEPT: Commencing at an iron pin on the centerline of County Road #71 at a point where it intersects the North line of SE 1/4 of the NW 1/4, said point being Two Hundred Ninety Four and Ninety-Three Hundredths (294.93) feet

east of the northwest corner of the SE 1/4 of the NW 1/4 of Section 15, Township 22N Range 13E for the point of beginning; thence S 89 degrees 50' 15" West (assumed bearing) a distance of Three Hundred Eighty-Four and Sixty-Three Hundredths (384.63) feet to an iron pin; thence N 03 degrees 49' 344" West a distance of Two Hundred Seventy and Twenty-Five Hundredths (270.25) feet to an iron pin; thence N 88 degrees 16' 44" East a distance of Two Hundred Forty-Five and Eighty-Eight Hundredths (245.88) feet to an iron pin on the centerline of County Road #71, thence S 29 degrees 37' 28" East along the centerline of said County Road #71 a distance of Three Hundred Seventeen and Forty-Four Hundredths (317.44) feet to the place of beginning. Containing 1.98 acres, more or less.

7. At the time of execution of the said Option Agreement, Pro-Eco paid consideration to Jack Fisher in the sum of Ten Thousand Dollars $10,000.00, said amount was ultimately credited against the purchase price specified in the Option Agreement.

8. A true and correct copy of the said Option Agreement is attached hereto, and marked as "Exhibit 1."

9. Preliminary drilling for the purpose of testing the suitability of the soil for a sanitary landfill site was conducted by Pro-Eco on the Jay County Real Estate from September 26, 1988 to September 29, 1988. The results of this preliminary drilling and initial testing indicated that the soil of the Jay County Real Estate appeared to Pro-Eco to be suitable for Pro-Eco's intended purpose.

10. Thereafter, during the month of October 1988, Pro-Eco engaged the Donan Engineering ("Donan") firm

of Jasper, Indiana, to serve as the consulting engineer with respect to the Jay County Real Estate. Donan's responsibility was to assist Pro-Eco in arranging for, and to supervise and oversee, soil boring and soil sampling and testing and the placement of piezometers beneath the surface of the Jay County Real Estate. Pro-Eco contracted for all such boring, sampling, testing and piezometer placements in order for Pro-Eco to accumulate data for inclusion in a Solid Waste Facility Permit Application.

11. A Solid Waste Facility Permit Application must be filed with the Indiana Department of Environmental Management ("IDEM") in order to be considered for the required permit from the State of Indiana to develop, construct and operate a sanitary landfill. A copy of the IDEM Solid Waste Facility Permit Application and the checklist of information which must be included in such an application are attached hereto and marked as "Exhibit 2."

12. During October 1988, Donan and Pro-Eco solicited bids preliminary to the selection of a drilling contractor to preform [sic] drilling services at the Jay County Real Estate. Copies of the bid solicitation letters are attached as "Exhibits 3A" through "3E." A copy of the list of specifications sent to each potential bidder is attached as "Exhibit 3F."

13. Also during October 1988, Pro-Eco reviewed the results of the preliminary drilling and initial soil testing with Donan and developed a plan for the placement of soil boring, the taking of soil samples and the placement of piezometers beneath the surface of the Jay County Real Estate.

14. On November 3, 1988, representatives of Pro-Eco and Donan met with representatives of the IDEM. The purpose of the meeting was to consult with the IDEM to determine whether the Jay County Real Estate might be suitable for use as a solid, non-hazardous waste disposal site based upon a preliminary review and to review Pro-Eco's efforts and intentions with respect to the Jay County Real Estate. Accordingly, at the meeting, Pro-Eco presented to the IDEM and reviewed with its representatives, a package of preliminary soil test results, proposed soil borings and sampling sites, proposed maps for the placement of monitoring wells, lithologic sections, siting maps and aerial photographs, all with respect to the proposed sanitary landfill on the Jay County Real Estate. A copy of the voluminous documents presented by Pro-Eco to the IDEM on that date are attached to the Complaint, First Amended Complaint and Second Amended Complaint, heretofore filed in this cause. The documents presented to the IDEM by the Pro-Eco were not intended to be nor do they, in fact, constitute a "Solid Waste Facility Permit Application."

15. On or about November 14, 1988, Pro-Eco entered into a written agreement with Donan providing for the rendition of further engineering and geotechnical services which were required in the process of gathering data for inclusion in the Solid Waste Facility Permit Application. A copy of that agreement is attached hereto and marked as "Exhibit 4."

16. Also on November 14, 1988, Pro-Eco mailed to the IDEM the original of that certain letter, which is attached hereto and marked as "Exhibit 5," thanking the staff of the IDEM for meeting with representatives of Pro-

Eco and confirming Pro-Eco's understanding of the IDEM's interpretation of the new Solid Waste Rules as applicable to Pro-Eco's proposed development of the Jay County Real Estate.

17. On or about November 23, 1988, Donan, acting on behalf of Pro-Eco, mailed to the IDEM the original of that certain letter which is attached hereto and marked as "Exhibit 6," advising the IDEM of Greenbaum's engagement and of the schedule for boring, sampling and piezometer placement at the Jay County Real Estate.

18. On November 25, 1988, Pro-Eco entered into a written agreement with Greenbaum Associates ("Greenbaum") providing for the rendition of certain drilling, sampling, piezometer placement and other services at the Jay County Real Estate, all of which was directly related to the gathering of data for inclusion in the Solid Waste Facility Permit Application. A copy of that agreement is attached hereto and marked as "Exhibit 7."

18a. On February 1, 1989, Pro-Eco entered into a written agreement with Hardesty Drilling & Testing Company ("Hardesty") providing for the rendition of certain drilling, sampling, piezometer placement and other services at the Jay County Real Estate, all of which was directly related to the gathering of data for inclusion in the Solid Waste Facility Permit Application. A copy of that agreement is attached hereto and marked as "Exhibit 7A."

19. Drilling, boring, sampling and piezometer placement in accordance with the documents earlier presented to the IDEM was conducted by Pro-Eco's contractor at the Jay County Real Estate during the months of

November and December of 1988 and January, February and March of 1989, all under Donan's supervision.

20. On or about February 28, 1989, Pro-Eco mailed to Jack Fisher a letter giving notice of Pro-Eco's election to extend for one (1) year Pro-Eco's option to purchase the Jay County Real Estate. Accompanying that letter was a check in the amount of Fifteen Thousand Dollars ($15,000.00), payable to Fisher in accordance with the terms of the Option Agreement. A true and accurate copy of the letter is attached hereto as Exhibit "7B."

21. Prior to March 20, 1989, Pro-Eco had incurred approximately the following expenses directly related to its intended initial evaluation regarding suitability of the Jay County Real Estate as a possible sanitary landfill site and its intention to file a Solid Waste Facility Permit Application with the IDEM:

1.)	Options for Land Purchase	$ 25,000.00
2.)	Outside Engineering and Drilling	
	a. Donan Engineering	$ 73,465.00
	b. Greenbaum Associates	$ 30,787.00
	c. Hardesty Drilling and Testing	$ 22,058.00
	d. Robert Hurst	$ 1,100.00
3.)	In-House Drilling Costs	$ 27,048.00
4.)	Professional Fees	$ 28,924.00
5.)	Travel	$ 5,977.00
	Total	$214,359.00

22. In addition, various in-house expenses were incurred by Pro-Eco and its parent company in the form of executive and employee time and overhead directly related to the intended development of the Jay County

Real Estate as a possible sanitary landfill, which expenses have not, as of this date, been specifically extracted from company records.

23. At the time Pro-Eco began investigating available real estate in Jay County, and during the time Pro-Eco was conducting the activities and incurring the expenses described in paragraphs 9 through 22 above, no zoning or other land use ordinances existed, including any ordinance prohibiting or regulating the use of real estate as a sanitary landfill, in Jay County. Early in 1989, however, the Jay County Commissioners became aware of Pro-Eco's activities and intention in connection with the Jay County Real Estate. With the knowledge that Pro-Eco was proceeding with preliminary drilling and testing in connection with its intention to develop the Jay County Real Estate for use as a sanitary landfill, the Jay County Commissioners realized that they would need to take some interim measure to to [sic] halt any further activity, thereby preserving the status quo.

24. At the meetings of the Jay County Board of Commissioners held February 2, 6, 22, 27, and March 6, 13, and 20, 1989, the Board discussed several issues with regard to sanitary landfills in Jay County. Copies of the official minutes of those meetings are attached hereto as Exhibits 8 through 14, inclusive.

25. During the February 27, 1989 meeting, the Board proposed Ordinance No. 1989-1, (the "Proposed Ordinance"), and set a public hearing on the Proposed Ordinance for March 20, 1989. Legal notice of the Proposed Ordinance and the March 20, 1989 public hearing was effected by the Board in accordance with Indiana law.

26. Pro-Eco received both constructive and actual notice of the Proposed Ordinance and the March 20, 1989 public hearing at the time of the publication of the first legal notice regarding said Ordinance. A representative from Pro-Eco attended the March 20, 1989 public hearing.

27. On March 20, 1989, after conducting a public hearing on the matter, the Board adopted Jay County Ordinance No. 1989-1 (the "Ordinance") which is the subject of this litigation. A copy of the Ordinance is attached hereto and marked as "Exhibit 15." At the time the Ordinance was enacted, Pro-Eco had not submitted to the IDEM, a Solid Waste Facility Permit Application for the construction or operation of a sanitary landfill on the Jay County Real Estate. In addition, the IDEM gave no information to Pro-Eco regarding whether or not any permit would, in fact, be issued to Pro-Eco for the Jay County Real Estate if Pro-Eco submitted a Solid Waste Facility Permit Application.

28. By enacting the Ordinance, the Jay County Board of Commissioners intended to prohibit the location, construction or operation of any new public or commercial sanitary landfill in Jay County until the adoption of an areawide land use management ordinance containing provisions for the regulation of sanitary landfills within Jay County.

29. Except with respect to the owner of the landfill presently in operation in Jay County, neither of the parties hereto are aware of any person, firm or organization other than Pro-Eco which was actively engaged during the years 1988 and 1989, in the development of any property in Jay County as a sanitary landfill.

30. As a direct result of the adoption of the Ordinance, Pro-Eco suspended its activities and those of its engineering and drilling contractors related to the accumulation of the data required to complete a Solid Waste Facility Permit Application. Pro-Eco also notified the IDEM. Copies of Pro-Eco's letters notifying Pro-Ecos's contractors and the IDEM of the suspension of activities in connection with the Jay County Real Esatate [sic] are attached as "Exhibits 15A" through "15D." In addition, Pro-Eco has requested that Donan preserve all samples already taken. A copy of the letter confirming Pro-Eco's request that Donan preserve samples is attached as "Exhibit 16."

31. Because of the expected duration of this litigation vis-a-vis the term of the Option Agreement, Pro-Eco concluded that it would be necessary in order to protect its investment to date, to exercise its option to purchase the Jay County Real Estate, notwithstanding the uncertainty of Pro-Eco's ability to acquire permit from the IDEM to construct and operate a sanitary landfill.

32. On or about April 3, 1989, Pro-Eco mailed written notice to Jack Fisher of Pro-Eco's intention to exercise its option to purchase the Jay County Real Estate. A copy of that notice is attached hereto and marked as "Exhibit 17."

33. On May 16, 1989, Pro-Eco purchased the Jay County Real Estate from Jack Fisher. A copy of the Warranty Deed, by which title to the Jay County Real Estate was transferred to Pro-Eco, is attached hereto and marked as "Exhibit 18."

34. At all relevant times, the following statutes were in full force and effect in the State of Indiana in the form set forth in Appendix A:

4-22-2-3
4-22-2-13
4-22-2-14
4-22-2-15
4-22-2-16
4-22-2-17
4-22-2-18
4-22-2-19
4-22-2-20
4-22-2-21
4-22-2-22
4-22-2-23
4-22-2-24
4-22-2-25
4-22-2-26
4-22-2-27
4-22-2-28
4-22-2-29
4-22-2-30
4-22-2-31
4-22-2-32
4-22-2-33
4-22-2-34
4-22-2-35
4-22-2-36
4-22-2-38
4-22-2-39
4-22-2-40
4-22-2-41
4-22-2-42
4-22-2-43
4-22-2-44
4-22-2-45

4-22-9-3
4-22-9-4
4-22-9-5
4-22-9-6
4-22-9-7

13-1-12-1
13-1-12-5
13-1-12-6
13-1-12-8
13-7-1-1
13-7-1-17
13-7-1-22
13-7-1-23
13-7-2-11
13-7-2-12
13-7-2-15
13-7-3-5
13-7-3-6
13-7-3-9
13-7-3-10
13-7-3-11
13-7-3-12
13-7-10-1
13-7-10-2
13-7-10-2.5
13-7-15-2

36-1-2-15
36-1-2-23
36-1-3-1
36-1-3-2
36-1-3-3
36-1-3-4
36-1-3-5
36-1-3-6
36-1-3-7
36-1-3-8

36-1-3-9
36-8-2-1
36-8-2-4
36-7-1-5
36-7-1-22
36-7-4-201
36-7-4-601
36-7-4-602
36-7-4-603
36-7-4-604
36-7-4-605
36-7-4-606
36-7-4-607
36-7-4-608
36-7-4-609
36-7-4-610
36-7-4-611
36-7-4-612
36-7-4-613
36-7-4-614
36-7-4-701
36-7-4-702
36-7-4-703
36-7-4-704
36-7-4-705
36-7-4-706
36-7-4-707
36-7-4-708
36-7-4-709
36-7-4-710
36-7-4-711
36-7-4-712
36-7-4-1019
36-9-30-4

35. At all relevant times, the following provisions of the Indiana Administrative Code were in full force and effect in the form set forth in Appendix B:

329 I.A.C. 1-1-1
329 I.A.C. 1-1-2
329 I.A.C. 1-1-3
329 I.A.C. 1-1-4

329 I.A.C. 2-1-1
329 I.A.C. 2-1-2
329 I.A.C. 2-1-3
329 I.A.C. 2-1-4
329 I.A.C. 2-1-5
329 I.A.C. 2-2-1
329 I.A.C. 2-8-1
329 I.A.C. 2-8-2
329 I.A.C. 2-8-3
329 I.A.C. 2-8-4
329 I.A.C. 2-8-5
329 I.A.C. 2-8-6
329 I.A.C. 2-8-7
329 I.A.C. 2-9-1
329 I.A.C. 2-9-4
329 I.A.C. 2-10-3
329 I.A.C. 2-11-1
329 I.A.C. 2-11-2
329 I.A.C. 2-11-3
329 I.A.C. 2-11-4
329 I.A.C. 2-11-5
329 I.A.C. 2-11-6
329 I.A.C. 2-11-7
329 I.A.C. 2-13-1
329 I.A.C. 2-13-2
329 I.A.C. 2-14-13

35a. At all relevant times, the following provisions of the Constitution of the the [sic] State of Indiana were in full force and effect in the form set forth in Appendix C:

Article 1 § 1
Article 1 § 12
Article 1 § 23

36. From and after March 20, 1989, to the present, Jay County, acting first through the Jay County Areawide Land Use Management ("JCLUMC"), which was created by the Ordinance, and then through the Jay County Advisory Planning Commission ("JCAPC") which was created by Jay County Ordinance No. 1989-2, has taken steps toward the ultimate adoption of a comprehensive land use plan. Copies of the minutes of the JCLUMC are attached as "Exhibits 19" through "24." A copy of Jay County Ordinance No. 1989-2, which created the JCAPC, is attached as "Exhibit 25." During the June 29, 1989 meeting of the JCLUMC, a Proposed Land Use Ordiance [sic] for Jay County, Indiana was presented. A copy of the Proposed Land Use Ordinance for Jay County is attached

as "Exhibit 26." This particular proposed land use ordinance is no longer being considered by the JCAPC.

BOWERS, HARRISON, KENT & MILLER

/s/ David V. Miller (RGS)
David V. Miller
Cedric Hustace
Robert Jeff Dodson
P.O. Box 1287
Evansville, IN 47706-1287

PRICE & SHULA

/s/ Rosemary G. Spalding
Rosemary G. Spalding
301 Massachusetts Avenue
Indianapolis, IN 46204

WHITEMAN, SHAPPEL & BURKETT

/s/ Bradley K. Burkett (RGS)
Bradley K. Burkett
120 North Commerce Street
Portland, IN 47371

[EXHIBITS NOT ATTACHED]

JAY COUNTY ORDINANCE NO. 1989-1

AN ORDINACE [SIC] CONCERNING THE REGULATION OF SOLID WASTE DISPOSAL IN JAY COUNTY, INDIANA ON LAND SITUATED OUTSIDE OF THE CORPORATE LIMITS OF ANY CITY OR TOWN IN JAY COUNTY, INDIANA.

WHEREAS, the Board of Commissioners of Jay County, Indiana, (hereinafter called the "Commissioners"), now finds that the construction and operation of public or commercial sanitary landfills constitutes a use of property that may create serious, permanent and irreversible environmental damage and may unnecessarily endanger the public health, safety or welfare of the citizens of Jay County, Indiana; and

WHEREAS, Commissioners now find that no county wide regulations exist regarding location, construction and operation of public or commercial sanitary landfills in Jay County, Indiana and that therefore the public health, safety and welfare of the citizens of Jay County, Indiana are not now adequately guaranteed and that the protection of the environment, the citizens themselves and the property of the citizens of Jay County are not protected form [sic] serious, permanent and irreversible damage by the location, construction and operation of said sanitary landfills; and

WHEREAS, the Commissioners now find that serious, permanent and irreversible environmental damage and unnecessary endangerment of public health, safety and welfare of the citizens of Jay County, Indiana may occur by permitting the construction and operation of any new public or commercial sanitary landfills on any

land outside the corporate limits of any city or town in Jay County, Indiana prior to the adoption and implementation of proper controls regulating the location, construction and operation of public or commercial sanitary landfills;

BE IT ORDAINED by the Board of Commissioners of Jay County, Indiana, as follows:

Section 1. *Sanitary Landfill Moratorium.* As of the effective date of this ordinance and notwithstanding any ordinance to the contrary, no public or commercial sanitary landfill, as defined in the Indiana Administrative Code, Title 330, Article 4, Rule 2-1(38) as recodified in Title 320.1 of the Indiana Administrative Code, may be located, constructed or operated on any land located within Jay County and outside of the city limits of any town or city located within Jay County prior to the occurence [sic] of the earlier of the following events: (a) the adoption by the Jay County Commissioners of an areawide land use management ordinance containing provisions for the regulation of sanitary landfills within Jay County, Indiana, or (b) three (3) years from and after the date of passage of this ordinance.

Provided, however, that the foregoing moratorium shall not apply to any public or commercial sanitary landfills for which a construction permit has been issued before the effective date of this ordinance by the Indiana Department of Environmental Management, but shall apply to any proposed expansion or construction for which permits have now been filed or may be filed but for which the final operational or construction permit has not been issued, except as noted below.

Provided also that the foregoing moratorium shall not apply to the following described real estate for which a permit has been filed for the operation of a sanitary landfill, but for which the final operational permit has not been issued, to-wit:

> Part of the west 1/2 of the northwest quarter of Section Nine (9), Township Twenty-two (22) north, Range Thirteen (13) east described as follows:
>
> Commencing at a cornerstone at the northeast corner of the northwest quarter of Section Nine (9), Township Twenty-two (22) north, Range Thirteen (13) east; thence west along the north line of the NW1/4 a distance of one thousand three hundred thirty two and seventy hundredths (1332.70) feet to an iron pin; thence S 00° 19' 00" East a distance of two thousand ten and fifty five hundredths (2010.55) feet to a corner post for the point of beginning; thence S 00° 19' 00" East (assumed bearing) a distance of six hundred twenty two and seventy six hundredths (622.76) feet to a stone found at the SE corner of the SE1/4 of the NW1/4; thence N 89° 54' 38" West along the south line of the NW1/4 a distance of one thousand three hundred twenty four and sixty eight hundredths (1324.68) feet to a point; thence N 00° 09' 15" West along the west line of the NW1/4 a distance of six hundred thirty three and fifty one hundredths (633.51) feet to a point; thence S 89° 26' 42" East a distance of one thousand three hundred twenty three (1323) feet to the place of beginning.
>
> Containing 19.08 acres more or less.

Section 2. *Establishment of an Area Land Use Management Committee.* There is hereby established by the Commissioners a committee to undertake a study as to the needs of areawide planning for Jay County for that portion of the county outside of the corporate limits of the cities and towns herein and to include in said study the need for regulations to control sanitary landfills and/or waste disposal facilities within Jay County. To that end, the Commissioners hereby create a committee to be known as the "Jay County Areawide Land Use Management Committee" to be composed of nine (9) members, consisting of citizens of Jay County named and designated by the Jay County Commissioners. Said Committee shall hold public meetings and shall conduct such investigations, studies and solicit such evidence as they deem necessary to make a report to the Jay County Commissioners within one hundred eighty (180) days as to their recommendations regarding the need or [sic] area land use management and the creation of an area plan commission for Jay County, Indiana. All meetings of said Committee shall be held pursuant to the Indiana Open Door Act and the public invited [sic] to attend. Such recommendations may, but not need [sic], consist of a recommended county wide land use management ordinance and/or county wide sanitary landfill regulations.

Section 3. *Violations.* Any person or entity violating Section 1 of this ordinance shall be subject to a civil penalty in an amount up to and including Five Thousand ($5,000.00) Dollars for each violation. Each day in violation of Section 1 of this ordinance may be considered as a separate violation for purposes of assessing the civil penalty. Nothing contained in this Section 3 shall constitute a

waiver of any other rights or remedies available to the Commissioners in the event of a violation of Section 1 of this ordinance and the Commissioners may take any action necessary to cause any persons or entities violating this ordinance to cease and desist.

Section 4. *Severability.* In the event any section, paragraph, sentence, clause or phrase of this ordinance is declared unconstitutional or invalid for any reason, no other provisions of this ordinance shall be affected thereby and all other provisions shall remain in full force and effect.

Section 5. *Effective Date.* The effective date of this ordinance shall be the 22 day of March, 1989.

Adopted by the Board of Commissioners of Jay County, Indiana this 20 day of March, 1989.

/s/ Walter Rodgers
Walter Rodgers,
Jay County Commissioner

/s/ John D. Mink
John D. Mink,
Jay County Commissioner

/s/ Ernest Muhlenkamp
Ernest Muhlenkamp,
Jay County Commissioner

Attest:

/s/ Marilyn Coleman
Marilyn Coleman,
Jay County Auditor

Supreme Court, U.S.
FILED
NOV 6 1995

No. 95-425

In The

Supreme Court of the United States

October Term, 1995

PRO-ECO, INC.,

Petitioner,

v.

BOARD OF COMMISSIONERS
OF JAY COUNTY, INDIANA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PETER J. RUSTHOVEN
Counsel of Record
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 638-1313

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether petitioner, which held an unexercised real estate option when the challenged land use ordinance on landfills was adopted, was deprived of any protected property right for Takings Clause purposes, when (i) applicable State law provides that an option gives no right of property in and to the land that is subject to the option, and (ii) petitioner never applied for the State permits required for a landfill.

2. Whether adoption of the ordinance, subsequently declared unenforceable for non-compliance with a State-law procedural prerequisite, deprived petitioner of "substantive due process," when (i) there are concededly no "fundamental liberties" at issue, and (ii) the ordinance recites valid and facially reasonable public health reasons for its adoption, which petitioner presented no evidence to rebut.

3. Whether petitioner's later claim to monetary damages was in any event not "based on" the declaratory judgment that the ordinance was unenforceable, which judgment determined there had been non-compliance with the State-law procedural prerequisite for adoption of the ordinance, but did not determine the parties' rights as to any of the theories on which petitioner then purported to base its damages claims.

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No. 95-425

In The

Supreme Court of the United States

October Term, 1995

PRO-ECO, INC.,

Petitioner,

v.

BOARD OF COMMISSIONERS
OF JAY COUNTY, INDIANA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1-25) is reported at 57 F.3d 505. The opinion of the District Court for the Southern District of Indiana (Pet. App. 26-30) is not reported.

JURISDICTION

The decision and judgment of the Court of Appeals for the Seventh Circuit was entered June 6, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE INVOLVED

The constitutional provisions and statutes involved are set forth in the petition (Pet. 3-5). The ordinance involved is set forth in the appendix to the petition (Pet. App. 71-75).

STATEMENT OF THE CASE

This action began as a challenge by petitioner Pro-Eco, Inc. ("Pro-Eco") to enforceability of an ordinance adopted by the respondent Board of Commissioners of Jay County, Indiana (the "County") imposing a moratorium on waste landfills. The ordinance would have barred Pro-Eco from developing such a landfill on certain real estate on which it held an unexercised option when the ordinance was adopted.

Pro-Eco obtained (Pet. App. 44-54) and successfully defended on appeal (Pet. App. 34-43) a declaratory judgment that the ordinance was unenforceable for non-compliance with a State-law procedural prerequisite -- namely, prior adoption of a comprehensive land use plan. But Pro-Eco then abandoned its effort to construct a landfill, and instead sought monetary damages from the County under various "takings," "due process" and tort theories. It specifically claimed entitlement to such damages under 28 U.S.C.

§ 2201, as "[f]urther . . . relief based on [the] declaratory judgment" addressing the enforceability of the ordinance.

The district court denied Pro-Eco's request, holding *inter alia* that any entitlement to monetary damages was not established by, and would not be "based on," the declaratory judgment on the ordinance's enforceability. Pet App. 26-30. The court of appeals affirmed, holding that Pro-Eco's asserted "constitutional" and other damages theories were in any event without merit. Pet. App. 1-25.

Pro-Eco's Statement of the Case (Pet. 5-15) sets out the history of the action in excessive (and at times argumentative) detail. However, a few points elided, distorted or omitted in Pro-Eco' Statement merit brief summary.

First, Pro-Eco's initial and amended complaints did not assert a claim to monetary damages. *See* Jay County Br. of Appellee at 3 (citing record). Indeed, Pro-Eco alleged the ordinance would cause injury "not compensable by money damages." *See id.* Thus, the declaratory judgment that the ordinance was unenforceable granted Pro-Eco all relief it had originally sought.

Second, the opening sentence of Pro-Eco's Statement -- reciting that it is "in the business of developing, constructing, and operating commercial sanitary landfills under permits issued by the Indiana Department of Environmental Management" (Pet. 5) -- is disingenuous here. In addition to the fact that Pro-Eco held only an unexercised option on the land when the ordinance was adopted, it is also uncontroverted that Pro-Eco never even applied for the State permits that

would have been required to operate a landfill on that real estate. *See* Pet. App. 63, 64 (¶¶ 27, 30).

Third, the assertion that "the District Court refused to permit Pro-Eco the opportunity to present evidence and arguments as to its damages at a hearing" (Pet. 12) ignores district court proceedings omitted in petitioner's Statement. Specifically, the County had moved for summary judgment on Pro-Eco's damages claims, including filing the "Statement of Undisputed Material Facts" required by Local Rule 56.1 of the Southern District of Indiana. *See* App. to Jay County Br. of Appellee. Among the undisputed facts stated were that Pro-Eco had offered no evidence to show that (i) the ordinance "is not rationally related to any legitimate state interests in public health, safety or welfare"; or (ii) "adoption of the ordinance was an act of disinterested malevolence or that Jay County took any allegedly unlawful action other that adopting the ordinance." *Id.* at 13 (¶¶ 39, 41).

Under the Local Rule, Pro-Eco was required to submit any material controverting such facts within fifteen days, or else have the same be "admitted to exist without controversy . . . ." It never made the required responsive filing. Thus, Pro-Eco had both the "opportunity" and the obligation to present evidence as to its damages claims, but did not do so.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not conflict with the holding of any other court. Further, the decision rests on readings of Indiana State law that, in addition to being accurate, are not in any event matters that

merit review by this Court. Further still, the result below is also correct for the independent ground relied upon by the district court, which the court of appeals found unnecessary to address. This case present no issue that warrants this Court's review on *certiorari*.

1. The court of appeals correctly held (Pet. App. 5-14) that Pro-Eco was not deprived of any protected property right in a way that implicates the Fifth Amendment's Takings Clause. This Court has made clear that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), quoted in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (takings case); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (same).

When the ordinance was adopted and any supposed "taking" occurred, Pro-Eco held only an unexercised option. In Indiana, an option holder has no right to compensation for an alleged taking. Thus, in *Haney v. Denny*, 135 Ind. App. 317, 193 N.E.2d 648 (1963), a lessee with an option to purchase land taken by eminent domain claimed a share of the condemnation award. This was summarily rejected: "A lease of real estate with an option to purchase, and particularly where the option has not ripened, as in the case at bar, does not create in the lessee and future optionee an interest in the property upon which recovery may be had after the same has been taken by eminent domain." 193 N.E.2d at 654, citing *Kritz v. Moon*, 88 Ind. App. 5, 163 N.E. 112, 117 (1928) (option did not give holder "any title to the land, either legal or equitable"); 29 C.J.S. *Eminent Domain* § 196

at 1101. *Accord, Lafayette Expo Center, Inc. v. Owens*, 531 N.E.2d 508, 511 (Ind. App. 1988) (held "many times" that "option to purchase gives no right of property in and to the thing which is the subject of the option").[1]

The court of appeals also properly rejected Pro-Eco's effort to characterize the "property" being "taken" as the option contract itself (as opposed to the land subject to the option): "Indiana does not see fit to protect holders of options to buy land against others who claim an interest in the land, so we should not grant Pro-Eco more rights through the back door of recognizing its option contract as property for purposes of the Takings Clause, especially when Indiana does not even recognize options as full-fledged contracts." Pet. App. 10 (footnote omitted). This is clearly a correct reading of Indiana law -- the necessary source, under this Court's decisions, for the "creat[ion]" and "dimensions" of any property interest for which Pro-Eco can seek compensation. Pro-Eco can cite no Indiana authority that even hints an option contract would be viewed as a compensable "property interest." This Court does not in any event sit to resolve

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[1] *Lafayette Expo Center* shows that Pro-Eco's effort to limit *Haney* to "'future optionee[s]'" whose options have not yet "ripened," Pet. 21 (emphasis added by Pro-Eco), is bootless. Also, *Haney* itself makes clear an option is not "ripe" in the sense that creates a protected property interest until it has been exercised: "Until and unless appellant's option ripened -- by the passage of time, payment of lease rental, the performance of other obligations set forth in the lease, *and the exercise of such option in the manner provided*, he had no interest other than as a lessee in and to the property. And such interest could be transformed to title only upon performance of the necessary obligations in the exercise of said option." 193 N.E.2d at 654 (emphasis added). Here, Pro-Eco concedes it did not even decide to exercise its option until *after* the ordinance took effect and any supposed "taking" had already occurred. *See* Pet. 7.

whether lower Federal courts have properly interpreted State law. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); Supreme Court Rule 10 (considerations governing review on *certiorari*); R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.2 at 166 (7th ed. 1993) (noting omission from Rule 10 of provision of predecessor rule that *certiorari* appropriate to review improper resolution by court of appeals of State law issues).[2]

For the same reason, no ground for *certiorari* is presented by petitioner's protest of what it calls the Seventh Circuit's "overly flippant" rejection of "Pro-Eco's claim that it held a protected property right in its 'right to do business,'" Pet. 23. This, too, is purely an issue of State law. As to the merits of Pro-Eco's theory, the most telling part of its petition is the implicit (albeit presumably unconscious) acknowledgement that some degree of flippancy is indeed warranted in rejecting it. The court of appeals aptly characterized the "right to do business" thesis as a "[g]rasping for any sort of property rights," and rightly concluded that "we will not override Indiana's explicit proscription against asserting options as property rights under the Takings Clause with Pro-Eco's assertion of a nebulous substantive right that,

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[2]*See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals"); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4036 at 42-43 (1988) ("same [deferential] approach is taken" by Court "even if the state law question is a fundamental ingredient of federal statutory or constitutional questions") (footnotes omitted).

apparently, has no basis in any traditional notions of property rights." Pet. App. 10 n.5. Once again, Pro-Eco cites no Indiana authority -- and none exists -- even hinting that any "right to do business" would be a compensable property interest for "takings" purposes.[3]

Finally, Pro-Eco's constitutional theories are not rescued by alluding to alleged deprivation of "'distinct investment-backed expectations,'" Pet. App. 25, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). As noted by the court of appeals (Pet. App. 10-11), *Penn Central* requires that such "expectations" be "reasonable," 438 U.S. at 124-25. No "reasonable expectation" exists (in the constitutional sense required for a takings claim) when an owner still needs government permits, which it has no assurance of obtaining, to allow the desired use. Indeed, *Penn Central* expressly rejected the idea that owners can

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[3]Cases cited by Pro-Eco for "right to do business" rhetoric are far afield. At issue in *Herman v. State*, 8 Ind. 545 (1856), was the State consitutional validity of a statute creating a government alcoholic beverage monopoly. *Eaton Corp. v. Appliance Valve Corp.*, 526 F. Supp. 1172, 1180-81 (1981), *aff'd*, 688 F.2d 842 (7th Cir. 1982), involved an effort on claimed "trade secrets" grounds to enjoin business activities of an ex-employee; also, the case it quotes (quoted in turn by Pro-Eco) is from California, not Indiana. In briefing below, Pro-Eco advanced its "right to do business" thesis as a supposed "tort" rather than a "takings" claim, relying on *Miller v. Ortman*, 235 Ind. 641, 136 N.E.2d 17, 34 (1957) -- also not a "takings" case. It then conceded that Indiana cases "limit[] the compensable tortious conduct contemplated by the *Miller* court to conduct which damages 'protectable property' such as the goodwill of the business, its contracts, and confidential customer information." Pro-Eco Br. of Appellant at 29. None of this is involved here; and none of these cases suggests Indiana views an amorphous "right to do business" as a compensable "property interest" in the takings context.

"establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Id.* at 130. The unreasonableness of any such expectation is especially apparent when, as here, the complaining party never even applied for the necessary State permits.

2. Pro-Eco presents no serious issue of any violation of "substantive due process," which requires it to show either (i) infringement on "'fundamental' liberty interests," *Reno v. Flores*, 507 U.S. ___, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16 (1993), or (ii) that the ordinance was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," *Euclid v. Amber Realty Co.*, 272 U.S. 365, 385 (1926). As to the first, Pro-Eco does not claim any "fundamental liberties" are at issue.[4]

Instead, Pro-Eco argues it was denied an opportunity to present evidence that the ordinance violated *Euclid* standards. In addition to having no import for any case but this one, this argument fails for two independent reasons. The first involves familiar principles of "rational basis" review pointed out by the court of appeals, which noted the public health reasons stated by the County in adopting the ordinance:

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[4]As held below, "'[d]epositing garbage in landfills is not exactly a fundamental right,'" but instead a "'highly regulated industry.'" Pet. App. 19, quoting *Mid-American Waste Sys. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995). Further, "'[c]orporations do not have fundamental rights,'" a category that "describes only personal liberties." Pet. App. 19, quoting *Mid-American*, 49 F.3d at 291.

> Concern for public health is a sufficient reason on its face to pass the *Euclid* test, and "governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction."

Pet. App. 19-20, quoting *Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990).

The second reason Pro-Eco's argument fails is that it in fact refused to respond when it had both the opportunity and the obligation to present any evidence that the ordinance was allegedly "arbitrary and unreasonable. The County had moved for summary judgment on Pro-Eco's damages claims, filing the "Statement of Undisputed Material Facts" required by S.D. Ind. Rule 56.1. These undisputed facts included that Pro-Eco had offered no evidence to show that (i) the ordinance "is not rationally related to any legitimate state interests in public health, safety or welfare"; or (ii) "adoption of the ordinance was an act of disinterested malevolence or that Jay County took any allegedly unlawful action other that adopting the ordinance." *See* Statement of the Case, *supra* at 4.

Under the Rule, Pro-Eco was required to submit any material controverting such facts within fifteen days, or else have the same be "admitted to exist without controversy . . . ." It never made this required responsive filing. Hence, Pro-Eco may not legitimately raise at any stage of these proceedings -- much less in petitioning this Court for *certiorari* -- that it was "denied" the opportunity to present whatever evidence it supposedly possessed that the ordinance fails "substantive due process" standards.

3. The result below is also correct for the independent reason relied upon the district court -- namely, that the monetary relief belatedly sought by Pro-Eco was not "based on" (within the meaning of 28 U.S.C. § 2201) the earlier declaratory judgment that the ordinance was invalid for failure first to have adopted a comprehensive land use plan. Pro-Eco's argument that its money damages claims are "based on" that declaratory judgment is incorrect, and in any event raises no issue meriting this Court's attention.[5]

Pro-Eco's argument simply ignores critical language of the statute. The further relief "based on" a declaratory judgment that is authorized by 28 U.S.C. § 2201 is "against any adverse party *whose rights have been determined by such*

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[5]Also without merit is Pro-Eco's protest that "the Seventh Circuit's failure to address this statutory issue, in favor of leaping ahead to decide issues of constitutional import," violates the rule that "'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,'" Pet. 19, quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). This is misplaced. The principle animating the rule is that courts should not declare *un*constitutional action by a State (as in *Escambia County*) or a coordinate branch, without first exploring alternative decisional bases that do not raise the sensitive issues of Federalism or relations among the branches entailed in any such declaration. This does not mean courts must refrain from holding that a supposed "constitutional" challenge is meritless. Contrary to Pro-Eco's rhetoric, what the court of appeals decided here was that the "issues" Pro-Eco raised were *not* of "constitutional import". Pro-Eco's claim that the court should "first" have decided the "statutory issue" under § 2201 is especially incongruous since Pro-Eco had to win on *both* its statutory *and* its "constitutional" claims to prevail. Had the court "first" decided the statutory issues, the only possible results would have been (i) affirming the district court (in which case Pro-Eco would lose); or (ii) deciding Pro-Eco was "right" on the statute, but -- as the court held -- wrong on the "constitutional" claims (in which case Pro-Eco would also lose).

judgment" (emphasis added). Here, the only "rights" of the County "determined" by the declaratory judgment were that it could not enforce the challenged ordinance, due to the State-law procedural flaw of not having first adopted a comprehensive land use plan. However, that judgment did *not* "determine[]" a host of issues involving the County's "rights" in any asserted action for monetary damages arising from the adoption of the ordinance. Those issues, which the declaratory judgment on enforceability did even purport to address, involve the very matters on which the court of appeals held Pro-Eco's claims were without merit.

By contrast, decisions allowing supplemental relief under § 2201 typically involve circumstances where the right to such relief "follow[ed] absolutely from" a declaratory judgment that decided "the only factual and legal predicate necessary for recovery," *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548, 549 (D.C. Cir.) (lease expressly entitled lessor to liquidated damages and costs where lessee failed to vacate upon termination), *cert. denied*, 488 U.S. 849 (1988), or the declaratory judgment "conclusively established" the right to the supplemental relief sought, *Besler v. United States Dep't of Agriculture*, 639 F.2d 453, 455 (8th Cir. 1981). *Compare, e.g., Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522 (2d Cir.) (right to infringement damages "based on" declaratory judgment as to copyright ownership, where only apparent fact issue was calculation of damages), *cert. denied*, 358 U.S. 831 (1958), *with, e.g., Penthouse Int'l, Ltd. v. Barnes*, 792 F.2d 943, 950 (9th Cir. 1986) (district court abused discretion by granting further relief not needed to effectuate its declaratory judgment, and involving issues not decided in original part of bifurcated trial).

Whatever variances in nuance and emphasis may be extracted from the body of district and circuit court opinions on § 2201, it is clear there is no raging division on issues of burning import that demands resolution by this Court. It is clearer still that this case -- where the "further relief" sought ranges far beyond the rights determined by the declaratory judgment, and involves theories of recovery that the court of appeals correctly held meritless -- is a thoroughly unsuitable vehicle for providing guidance on the statute, even if any guidance were needed.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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